THE SILHA Bulletin

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Members of the Press Detained and Targeted with Use of Force by Police, Despite Court Order

The trial of former Minneapolis Police Department (MPD) officer Derek Chauvin, charged with second-degree murder, third-degree murder, and second-degree manslaughter after he pressed his knee into the neck of George Floyd, a 46-year-old Black man, who died at the scene in May 2020, began on March 29, 2021. It continued through mid-April. Meanwhile, on April 11, 2021, a Brooklyn Center, Minn. police officer, Kimberly Potter, shot and killed Daunte Wright, a 20-year-old Black man, during a traffic stop. Potter claimed to have accidentally grabbed and used her gun rather than a taser. In the course of these events, protests arose once more in the Twin Cities. Although the initial protests were generally peaceful, a significant law enforcement response followed when tensions escalated. Journalists, photographers, and other members of the press covering the protests faced arrest, use of force, and threats by law enforcement. Law enforcement also issued broad dispersal orders, requiring members of the public and press alike to leave an area, ostensibly in the interest of public safety.

In response, on April 14, 2021, the American Civil Liberties Union (ACLU) of Minnesota filed a motion in U.S. District Court for the District of Minnesota on behalf of a number of journalists, photographers, and other members of the news media seeking a temporary restraining order (TRO) to prohibit arrests, attacks, and threats by police during protests and demonstrations. The defendants included the City of Minneapolis; Minnesota Department of Public Safety Commissioner John Harrington, in his individual and official capacity; Minnesota State Patrol Colonel Matthew Langer, in his individual and official capacity; and their agents, servants, employees, and representatives.

On April 16, 2021, District of Minnesota Judge Wilhelmina M. Wright issued the TRO, which prevented the law enforcement defendants from "arresting, threatening to arrest, or using physical force — including through use of flash bang grenades, non-lethal projectiles, riot batons, or any other means — directed against any person whom they know or reasonably should know is a Journalist . . ., unless [law enforcement has] probable cause to believe that such individual has committed a crime." The order also expressly exempted journalists from dispersal orders, including during curfews from which members of the press were already exempt.

Wright weighed the press' ability to gather news and inform the public against law enforcement interests in general dispersal orders. First, Wright concluded that the plaintiffs "were engaged in constitutionally protected news-gathering activities," citing the finding in *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) that "without some protection for seeking out the news, freedom of the press could be eviscerated." She also cited *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012), in which the U.S. Court of Appeals for the Seventh Circuit held that the First Amendment "goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."

Second, Wright rejected the defendants' argument that "the press had no right to 'remain in an active dispersal area'" and that such orders "render[] the press's news-gathering activities no longer a 'protected activity[.]'" She reasoned that because most of the events transpired in public, the news gathering generally took place on public streets and sidewalks, to which the press had a qualified right of access. Wright further found that the dispersal orders were not "narrowly tailored" because the curfews put in place in Brooklyn Center exempted the press. She added that "preliminary injunctions issued by other courts in similar circumstances have required members of the press to adequately identify themselves, refrain from impeding law enforcement activities, and comply with all laws other than general dispersal orders; and those injunctions have maintained law enforcement officers' authority to . . . 'arrest or otherwise engage with persons who commit unlawful acts,'" citing *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020).

Third, Wright found that the law enforcement dispersal orders create a chilling effect on news gathering. She further concluded that there was "a documented pattern of hostility by the State Defendants to members of the press" during racial justice protests dating back to May 2020, and that the defendants "were motivated, at least in part, by the press's First Amendment activities."

Finally, Wright concluded that the plaintiffs raised "a legitimate constitutional question," and that the public interest weighs in favor of the press informing the public about newsworthy events over police dispersal orders, therefore favoring First Amendment principles. She accordingly granted the plaintiffs' request for a TRO. The full order is available online at: https://assets.documentcloud.org/documents/20618077/tro-minnesota-journalists-at-protests-goyette.pdf.

Despite the TRO, law enforcement continued to target members of the press, intentionally or not. On the night of April 16/17, 2021, several members of the news media were detained

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by law enforcement, who forced them to submit to photographs being taken of themselves and their credentials. Members of the press also faced the use of chemical agents and use of force by police. According to the U.S. Press Freedom Tracker, a database of press freedom violations in the United States and around the world managed by the Freedom of the Press Foundation, on April 17, there were at least seven assaults and three arrests/detainments of journalists. Previously, at least two confrontations between members of the press and law enforcement took place on April 13 during racial justice demonstrations in Brooklyn Center.

In an April 17 interview with *USA Today*, Adam Hansen, an attorney with Apollo Law LLC who is working on the civil case with ACLU-Minnesota, said law enforcement's actions directly violated the TRO. "The emergency order requires law enforcement to take certain steps to protect journalists . . . the order requires law enforcement to leave them alone," Hansen said. "We absolutely see what happened last night as a violation of the court's order and we're doing everything we can to make sure that it doesn't continue tonight and on into the future."

On the afternoon of April 17, Ballard Spahr attorney Leita Walker, along with representatives from the Minneapolis *Star Tribune*, Minnesota Public Radio (MPR), and WCCO, the Twin Cities' CBS affiliate, met with Gov. Tim Walz, his spokesperson Teddy Tschann, Department of Corrections Commissioner Paul Schnell, Department of Public Safety Commissioner John Harrington, and Minnesota State Patrol Chief Matt Langer in an off-the-record meeting to discuss the confrontations that took place the night before. In an email to Minnesota journalists, national media organizations, free press advocates, and others, Walker wrote that the officials "deeply regretted the misconduct that occurred." They also "embrace" the TRO, according to Walker. However, the officials acknowledged that "they are struggling with implementing some of what it orders" and having a "unified command" given there are over a dozen law enforcement agencies responding to the protests. The officials also acknowledged that "taking photographs of journalists was a mistake and [that they] will not be doing that going forward." Finally, Walker provided advice in her email that despite the TRO, "journalists [sh]ould still . . . follow dispersal orders, for their own personal safety, including because not every [law enforcement] agency is subject to the TRO."

In a letter sent via email following the meeting, Walker, on behalf of 27 news organizations and press advocacy groups, including the Silha Center for the Study of Media Ethics and Law, wrote to the officials to "impress upon [them] the gravity of the misconduct and to memorialize our conversation and the media's expectations going forward." Walker asserted that "[t]he First Amendment is clear: journalists have a robust right of access to gather and report the news without fear of intrusion or interference by law enforcement." She observed, however, that the TRO had been violated repeatedly by law enforcement, especially on the night of April 16/17.

Walker also noted that "the abuses perpetrated by law enforcement officers in the Twin Cities over the past several nights — and going back to last summer — are alarming and, yes, threaten to set [Minnesota] apart" from the rest of the United States, even as political and social tension affect all areas of the country. Additionally, Walker emphasized that "members of the media on the ground in Minnesota take their role in reporting on the events unfolding seriously. They understand the challenges you face in keeping the peace and they do not want to make your job harder. They are professionals who have no interest in 'being a part of the story' themselves." She added, "All we ask is that law enforcement also act reasonably and in a manner consistent with the U.S. Constitution and judicial orders. We look forward to working with you over the coming days and months to ensure that both law enforcement officers and the press are able to do their jobs effectively and that these abuses are not repeated. The full letter is available online at: http://www.mnspj.org/wp-content/uploads/4_17_21-Treatment-of-Journalists-in-Brooklyn-Center.pdf.

The same afternoon, the ACLU of Minnesota sent a letter to Judge Wright "to call . . . attention to unfortunate developments that have arisen in this case since the Court issued the [TRO] yesterday." The letter contended that only hours after the TRO took effect, "the State Defendants escalated the level of assault and harassment of journalists to an intolerable degree." The letter provided examples, each of which is detailed below. It also noted that counsel for both the plaintiffs and defendants met on the morning of April 17 to discuss the events of the night before. The letter expressed concern that despite the meeting,"the State Defendants remain fixated on 'grey area' and/or hypothetical cases, whereas Plaintiffs are merely asking the State Defendants to comply with this Court's Order and stop the targeted, methodical harassment of members of the press who are clearly identifiable through their clothes, credentials and/or equipment[.]"

The letter concluded by stating that "Plaintiffs appreciate that the Court permitted the State Defendants twenty-four hours to provide copies of the Court's order to all of their employees. Plaintiffs grow increasingly concerned, however, that the State Defendants do not intend to comply with the TRO without further intervention from the Court." The letter added that the defendants could also continue to defend actions taken against the press by arguing that the protests create a "chaotic environment" and that protesters can pose as members of the press. The letter therefore requested the opportunity to "advise the Court of our ongoing concerns." The letter, which was signed by Teresa Nelson, the ACLU of Minnesota legal director, is available online at: https://www.documentcloud.org/documents/20618245-letter-to-judge-wright-journalists-covering-minnesota-protests.

In an April 17 statement, the Minnesota State Patrol (MSP) said that "[f]ollowing feedback from media, and in light of a recent temporary restraining order (TRO) filed in federal court, MSP will not photograph journalists or their credentials." However, the statement noted that MSP would continue "check[ing] credentials so media will not be detained any longer than is necessary." The statement added, "The MSP has not and will not target media for doing the important work of showing those who are exercising their first amendment rights to express themselves, or those who are engaged in the violent, illegal activity law enforcement is trying to prevent." The full statement is available online at: https://safetynet.mn.gov/Pages/msp-statement-recent-temporary-restraining-order.aspx.

In an April 18 statement, the the Minnesota Pro Chapter of the Society of Professional Journalists (SPJ) and the Minnesota chapter of the Asian American Journalists Association (AAJA) "decr[ied] in the strongest possible terms the violent targeting and detention of journalists by law enforcement authorities during ongoing protests in Brooklyn Center." The statement continued, "A free press is vital to democracy, and ordering the press to leave the area, detaining reporters on their stomachs and photographing their faces, credentials and I.D.s is tantamount to

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intimidation." The statement concluded by adding, "Let us do our jobs." The full statement is available online at: http://www.mnspj.org/2021/04/17/mnspj-decries-treatment-of-journalists-at-brooklyn-center-protests/.

Also on April 18, Gov. Walz was interviewed by WCCO Sunday morning anchor and reporter Esme Murphy. When asked about the treatment of journalists by law enforcement, Walz said, "Apologies are not enough. It just cannot happen. These are volatile situations. And that's not an excuse. It's an understanding that we need to continue to get better.. . . Reporters are there to hold police accountable. They're there to hold protesters accountable. They're there to make sure this is done in accordance with our law. If they are detained, for any amount of time and held back, they are unable to do their jobs." Walz added, "The assault on media across the world and even in our country over the last few years is chilling. We cannot function as a democracy if they are not there. My apologies are sincere, but I will tell you what, they will take that apology much more seriously if they see actions." Walz provided the example of no longer taking photographs of journalists and their press credentials, saying that law enforcement does not have the right to hold journalists in that fashion. He also stated that law enforcement should not detain a single journalist, especially based on their race.

Walz concluded his thoughts on the news media by pledging that "the press needs to be there [at protests]," including news outlets like Unicorn Riot in addition to traditional journalists and media outlets. The full interview is available online at: https://minnesota.cbslocal.com/video/5501269-interview-gov-tim-walz-on-brooklyn-center-protests-and-law-enforcement-response/.

Jane E. Kirtley, Silha Professor of Media Ethics and Law and director of the Silha Center for the Study of Media Ethics and Law, also released a statement. "Members of the public have a First Amendment right to peaceably assemble, and the news media have a concomitant right to report on those peaceful protests. When tensions escalate, and law enforcement responds, it is essential that law enforcement neither impedes nor harasses journalists who provide a window on these activities. As we have seen during the coverage of the Derek Chauvin trial, the public relies on the independent news media to facilitate oversight and understanding of the criminal justice process."

Below is a running list of the incidents between the press and police.

Night of April 16/17, 2021

On April 17, WCCO reported that law enforcement detained reporter Reg Chapman and WCCO photojournalists. The police ordered the journalists to lie on the ground as they took pictures of them and their credentials. More information about this incident from WCCO is available online at: https://minnesota.cbslocal.com/2021/04/17/wcco-journalists-detained-told-to-lay-on-ground-during-brooklyn-center-protests/. Additional information from *USA Today* is available online at: https://www.usatoday.com/story/news/nation/2021/04/17/brooklyn-center-protests-police-round-up-journalists/7268057002/. A video of the incident is available online at: https://youtu.be/PIRzKemQIc8.

Early in the morning on April 17, *USA Today* senior video producer Jasper Colt tweeted that law enforcement, "[a]fter dispersing protesters in #BrooklynCenterMN tonight, . . . surrounded members of the media and made us lie flat on our stomachs. They then photographed our faces, credentials and identification before allowing us to leave the perimeter." The full tweet is available online at: https://twitter.com/jaspercolt/status/1383285891104342023.

Minneapolis *Star Tribune* reporter Liz Sawyer similarly tweeted that members of the news media were "ushered to a checkpoint where state patrol is taking pictures of every journalist's credentials and face." A video depicting what took place is available online at: https://twitter.com/bylizsawyer/status/1383260779084861444?s=21.

In a separate tweet, *Star Tribune* video journalist Mark Vancleave posted a video depicting Sawyer and fellow *Star Tribune* photographer Susan Du "being 'processed' by Minnesota State Patrol after documenting mass arrest tonight in Brooklyn Center." A video of the interaction is available online at: https://twitter.com/MDVancleave/status/1383265657601413125?s=20.

According to the ACLU of Minnesota's letter to Judge Wright, "[d]uring this incident, Minnesota State Patrol threatened [photojournalist] Chris Tuite with arrest multiple times, thrust a can of pepper spray in his face, and grabbed him with such force that it ripped his clothes." Photojournalist Chris Juhn was similarly detained and forced to submit to a press credential check and photographs.

Vancleave also tweeted that photojournalist Tim Evans "was punched in the face by an officer while trying to present his press credentials to law enforcement." Vancleave included a screenshot of Evans' recollection of the incident, in which he wrote, "The sheriff sprayed me directly in the face with mace. He tackled me to the ground as I was telling him I'm press. When I was on the ground, I showed him my badge . . . and he punched me in the face, then tore off my badge and threw it in the dirt. Another officer came over, I told him I was press and then he smashed my head into the ground." The full screenshot of Evans' account is available online at: https://twitter.com/MDVancleave/status/1383266492150542346?s=20.

According to an April 17 tweet by freelance photographer Alex Kent, *Agence France-Presse* video correspondent Eléonore Sens and an unidentified member of the press were "maced by Minnesota Police after an unlawful assembly [was] declared[.]" The full tweet, which includes a photo of the incident, is available online at: https://twitter.com/AlexKentTN/status/1383290508181590018/photo/1.

Night of April 13/14, 2021

On April 16, Adam Gray, chief photographer for South West News Service, based in the United Kingdom, tweeted that he was "rushed whilst leaving, cuffed, photographed and put in a squad car and charged/citated [*sic*] with failure to obey an order" on April 13. He added that on the night of April 16, "Law enforcement in #BrooklynCenter tonight punched, pepper sprayed, chased, detained and photographed media as they Bull rushed protestors." Gray's series of tweets is available online at: https://twitter.com/agrayphoto/status/1383275095175561221?s=20.

On April 13, *Star Tribune* reporter Andy Mannix tweeted that law enforcement "was firing a lot of projectiles" as demonstrations were approaching their end for the night. Mannix stated that one less-lethal munition "bounced off the bottom of [his] boot as [he] was walking away." Mannix's full tweet is available online at: https://twitter.com/AndrewMannix/status/1382159998457896960.

According to attorney Leita Walker in her email to Gov. Tim Walz and other Minnesota officials, CNN producer Carolyn Sung was "thrown to the ground and arrested by state troopers . . . while trying to comply with a dispersal order." One trooper reportedly yelled at Sung, whose primary language is English, "Do you speak English?" Despite repeatedly

A Message from the Director

Regular readers of the Silha *Bulletin* will recognize that the Winter/Spring 2021 issue is a departure from our usual format. Instead of providing you with a roundup of significant legal and media ethics developments of the past five months, we have chosen a different approach.

This issue does two things. First, we are republishing Postdoctoral Associate (and long-time *Bulletin* editor) Scott Memmel's comprehensive documentation of the threats to the press and to free speech that arose during the racial justice protests following the death of Daunte Wright in Brooklyn Center, Minn. on April 11, 2021.

Second, we are showcasing some of the scholarly work of our 2020-21 Silha Center Research Assistants. They are pursuing – or in Scott's case, already received – the PhD degree here at the Hubbard School of Journalism and Mass Communication. All three of their papers address topics of special interest to them, and that we believe will also be valuable to our readership. This format allows them to develop their topics in more detail than would be possible in our typical *Bulletin* format.

Postdoctoral Associate Scott Memmel's paper, *Targeting News While Targeted By Police: How the Lack of First Amendment Protection for Newsgathering Allows Greater Law Enforcement Intrusion and Interference*, focuses on an extremely timely issue and is an outgrowth of his prize-winning dissertation which he successfully defended in 2020. Scott's dissertation will soon be a book published by the University of Missouri Press.

Research Assistant Sarah Wiley, who passed her PhD "prelims" earlier this year and is now officially a PhD candidate, has a strong scholarly interest in technological issues affecting the media, particularly AI (Artificial Intelligence). Her paper, *Content Moderation and Constitutional Hurdles: First Amendment Limitations on Platform Regulation*, is an overview of one of the most hotly-debated topics of the past year: whether and how to regulate content on social media platforms. Sarah has just concluded her final appointment to the Silha Center, and we wish her well as she moves forward with the writing of her doctoral dissertation.

Finally, PhD student and current Silha *Bulletin* editor Jonathan Anderson has been studying state open records laws and their impact on the public's right to know since before he came to the University of Minnesota in 2018. In his paper, *Challenging Government Secrecy: An Analysis of Minnesota Government Data Practices Act Cases in Administrative Court*, he examines a Minnesota peculiarity: an option for frustrated requesters to seek expedited review of an agency's denial by filing a complaint with the state's Office of Administrative Hearings (OAH), rather than through a conventional lawsuit.

I am truly delighted to share the outstanding work of our Silha research staff with you. They – and I – would love to hear what you think about it.

Jane E. Kirtley, Director
Silha Center for the Study of Media Ethics and Law

explaining that she was a member of the news media, Sung was "placed in a prisoner-transport bus and sent to the Hennepin County Jail, where she was patted down and searched by a female officer who put her hands down Sung's pants and in her bra, fingerprinted, electronically body-scanned, and ordered to strip and put on an orange uniform."

In a series of tweets on April 17, *Star Tribune* reporter Ryan Faircloth described how law enforcement surrounded a vehicle in which *New York Times* photojournalist Joshua Rashaad McFadden, a Black man, was a passenger. Faircloth quoted McFadden, who said, "They're hitting me, they're hitting my camera as if they're trying to break my camera lens . . . telling me to get out, but I clearly couldn't get out because now they're blocking the doors." According to Faircloth, only after "a white journalist [told] the officers that McFadden was indeed a journalist for them to let him go." McFadden added, "I am assuming because I am a Black photographer that they would not believe me or look at my press credential until who I was with said, 'Oh, he's with the Times.'" Faircloth's thread is available online at: https://twitter.com/RyanFaircloth/status/1383578935301087238.

Night of April 12/13, 2021

Star Tribune video journalist Mark Vancleave tweeted on April 17 that on the night of April 12/13, he was shot in the hand by a rubber bullet fired by law enforcement. According to Vancleave, "[t]he impact broke [his] ring finger in two places requiring surgery." He added, "I won't be able to pick up my camera again for at least six weeks." A photo of the injury and a video of the incident is available online at: https://twitter.com/MDVancleave/status/1383514640001363974?s=20.

In her letter to Minnesota officials, including Gov. Tim Walz, attorney Leita Walker noted that "[t]wo separate photojournalists on assignment for The New York Times were harassed by officers." In one case, "a Minneapolis State Patrol Captain recognized the photojournalist, rushed out of a police line, and grabbed him. The officer then pulled the journalist behind the police line where another officer held his hands behind his back and took his phone. When the journalist asked 'why,' the officer said: 'Because that's our strategy right now.'" In the other case, a police officer "used a chemical irritant against a protestor next to the journalist" before "lung[ing] forward and aimed the irritant directly at the journalist from a distance of approximately 4-5 feet."

— Scott Memmel
Postdoctoral Associate

***On April 18, 2021, the Silha Center for the Study of Media Ethics and Law published on its website the preceding special report on the media law issues arising from the actions taken by law enforcement against members of the press at recent racial justice protests. The demonstrations surrounded the trial of former Minneapolis Police Department (MPD) officer Derek Chauvin and the April 11, 2021 police killing of Daunte Wright, a 20-year-old Black man, during a traffic stop in Brooklyn Center, Minn. Journalists, photographers, and other members of the press covering the protests faced arrest, use of force, and threats by law enforcement despite a federal court order limiting such actions. Given the importance of the events and court order, we are republishing the report as the cover story of this issue of the Silha* Bulletin.**

Targeting News While Targeted By Police: How the Lack of First Amendment Protection for Newsgathering Allows Greater Law Enforcement Intrusion and Interference

On June 30, 1971, the U.S. Supreme Court ruled in *New York Times v. United States* — the landmark case known as the "Pentagon Papers" — that prior restraints upon the press are almost always unconstitutional, setting an almost insurmountable standard under the First Amendment.[1] In a concurring opinion, Justice Hugo Black provided one of the most powerful defenses of freedom of the press in the history of the Court. He wrote that the First Amendment was drafted to "abolish" the government's "power to censor the press . . . so that the press would remain forever free to censure the Government [and] . . . inform the people."[2]

The opinion would be his last and, in many ways, would mark the end of an era in which the Supreme Court "laid the foundations of modern press freedom."[3] After serving on the court for nearly 35 years, Justice Black, who was known for his First Amendment absolutism, resigned in September 1971. Within one week, he suffered a stroke and died a few days later.[4] After several nominees turned him down, President Richard Nixon appointed Justice Lewis F. Powell Jr. to take Black's seat. On June 29, 1972, just one day shy of exactly a year following *New York Times v. United States*, the Supreme Court ruled against the press in *Branzburg v. Hayes* (1972), holding that the press does not have a First Amendment privilege to avoid grand jury subpoenas seeking disclosure of confidential sources and information obtained through eye-witness observations. Notably, the 5-4 ruling by the Court hinged on an ambiguous concurrence by Justice Powell.

In ensuing cases, the Supreme Court cited *Branzburg* in denying the press special privileges in other contexts, including newsroom searches and seizures, media liability under laws of general applicability, and access to government-held information and locations such as crime scenes. A related line of federal and state court precedent went a step further and established that the press cannot interfere with police activities, favoring law enforcement interests over those of the press and public.

This article does not argue that Justice Black's resignation and death alone led to these lines of court precedent. However, the outcomes in *Branzburg* and the cases that followed could have been different with him on the high court. Timing is everything, and the consequences and negative effects stemming from this moment in 1971 and 1972 endure into the year 2021, which marks the 50th anniversary of *New York Times v. United States*. Without any action to recognize greater protection for newsgathering, especially when balanced against law enforcement interests, these negative effects will continue.

This article first details how newsgathering is a crucially important practice allowing the press to serve its important role in the United States, citing First Amendment theory and existing scholarship to demonstrate how and why this is the case. However, this article also cites previous scholarship focusing on two important areas of free press jurisprudence: (1) the blurring of the Speech and Press Clauses under the First Amendment and (2) the lack of constitutional protections for newsgathering.

Second, this article provides background on the high court's rulings in *New York Times v. United States* and *Branzburg*, walking through how these opinions took significantly different tracks in interpreting the First Amendment protections for freedom of the press. Although there are other potential explanations, Justice Black's departure from the Supreme Court provides a key reason for the differences in the course of just one year. In discussing this shift, this article demonstrates how *Branzburg* set the stage for the Supreme Court and lower courts to deny newsgathering protections under the First Amendment in the rulings that followed.

Third, this article details the line of court precedent following *Branzburg* in which the Court declined to grant the press special privileges not available to members of the public. This article also identifies a line of federal and state court precedent that favors law enforcement interests over those of the press. It argues that courts have not only failed to protect newsgathering under the First Amendment, but have also weighed it less favorably against law enforcement interests, allowing for greater government intrusion into the press' purposes and functions.

Fourth, this article applies these conclusions to current events. It outlines the consequences and negative effects of these lines of court precedent, focusing on significant instances of journalists facing arrest, use of force, and threats by police while reporting on racial justice protests across the United States. Some members of the press have even faced prosecution for allegedly interfering with police activities, raising further problems and concerns. Taken together, the negative effects undermine newsgathering, source relationships, and journalists' physical safety, as well as chilling newsgathering in both the immediate and long-term.

Finally, this article argues that the negative effects arising from inadequate protections for newsgathering will only continue unless the courts recognize a First Amendment right for the press to gather news without government interference, especially in cases involving major societal events and issues of public concern. These include racial justice protests, where it is vital that the press be able to cover underrepresented communities' messages and report them to other members of the public. Additionally, it is essential that the press be able to report on police response to demonstrations to help to hold law enforcement accountable. This article therefore proposes a series of recommendations, including calling for judicial and legislative actions allowing for special privileges for the press specifically in relation to newsgathering. This article also calls for increased training of public officials and members of law enforcement, as well as improved communication between the press and police, to ensure understanding of the importance of newsgathering and the harms caused by arrests, use of force, and prosecutions of journalists for doing their jobs. Significantly, these harms not only affect the press and police, but also members of the public who rely on both institutions to best serve them.

1 New York Times v. United States, 403 U.S. 713, 714 (1971).
2 *Id.* at 717 (Black, J. concurring).
3 David A. Anderson, *Freedom of the Press*, 80 Texas L. Rev. 429, 506 (2002). Anderson added that the Supreme Court "usually found those rights in the First Amendment's guarantee of freedom of the press."
4 Richard L. Pacelle Jr., *Hugo Black*, First Amendment Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/1310/hugo-black.

I. First Amendment Theory and Existing Scholarship

In 2008, Michael Schudson articulated seven "functions" of U.S. journalism: (1) informing the public about political, economic, and social information and developments; (2) holding government accountable; (3) promoting public involvement in democracy; (4) creating change in society; (5) serve as a public forum for public discussions and debates; (6) providing analysis of complicated information and events; and (7) contributing to "social empathy."[5] Each of these functions relies on the media's ability not only to publish or broadcast information, but to gather it in the first place, through interviews, records requests, news conferences, accessing scenes of noteworthy events, and more. Thus, newsgathering lies at the heart of the press' purposes and functions in the United States, each of which is meant to benefit the public.

The necessity of newsgathering is reflected in First Amendment theory. For example, John H. Garvey and Frederick Schauer argued that the "earliest basis for the defense of . . . freedom of the press . . . [and] likely also the most enduring . . . is free speech as the instrument of the search for truth."[6] This concept can be applied to the press, which is meant to inform members of the public and foster public debate. Here, the word "search" necessarily implies seeking out, and hopefully obtaining, information, records, and data.[7]

Similarly, in 1977, Vincent Blasi referred to the press' watchdog role as the "checking value" of the press. Blasi contended that "a primary purpose of the freedoms of speech and press, then and now, [is] to check government as a way of preventing abuses."[8] To accomplish this, the press must be free from government intrusion into its independent functions. This will enable the press to monitor government conduct and help assure accountability. This will enable the press to monitor government conduct and help assure accountability, which necessarily includes the ability of journalists to investigate government bodies and officials.

In 1975, the editors of the *University of Pennsylvania Law Review* noted that several political theorists in the early years of the United States "provide some support for the existence and necessity of a press right to gather information."[9] For example, they cited James Madison, who wrote that information and the means for acquiring it are essential to a popular democratic government. Tunis Wortman, a Jeffersonian political theorist, wrote in 1800 that "The liberty of investigation is equally [indispensable] to the judicious exercise of the elective right."[10] The editors therefore concluded that "[d]espite the scarcity of evidence, it is apparent that a press right to gather information is compatible with the concept of freedom of the press understood by many politicians and political theorists of the early American Republic."[11]

Legal scholarship has long examined the relationship between the First Amendment Speech and Press Clauses.[12] For example, the editors of the *University of Pennsylvania Law Review* found that a "striking characteristic of Supreme Court opinions in this area is that one freedom is seldom distinguished from the other."[13] In 2002, David A. Anderson concluded that "[t]he constitutional protections that are most important to press freedom derive from the Speech Clause and apply to all speakers. The few that have been found in the Press Clause, and therefore specially favor the press, might better be reconceived as speech rights available to all."[14] Citing *Branzburg* and other notable cases, Anderson argued that the 1970s marked the beginning of the Supreme Court "avoid[ing] reliance on the Press Clause, save for the rare exceptions noted above, and the ringing rhetoric has often given way to skepticism about the claims of the media."[15]

Some scholars fear that the Press Clause has lost its value. Citing Chief Justice John Marshall's conclusion that "[i]t cannot be presumed that any clause in the constitution is intended to be without effect,"[16] Sonja R. West nevertheless contended that "the Press Clause seems to have become just that — if not 'mere surplusage,' then little more than an extension of the Speech Clause, an afterthought, a side dish to the main constitutional entree."[17] She argued that several potential harms arise from allowing the Press Clause to "lie dormant," positing that there is a "category of cases where it might not make sense to recognize a particular First Amendment right for all speakers, yet where our failure to recognize the right for the press harms our collective interest in a well-informed populace and a monitored government."[18]

In 2000, First Amendment scholar Erwin Chemerinsky concluded that the legal landscape "provides no constitutional protection for newsgathering."[19] He added, "The Supreme Court's low esteem for the press, which is shared by judges at all levels, is reflected in constitutional doctrine."[20] The result, according to Chemerinsky, is the increased ability to "hold[] the media liable for . . . undercover reporting."[21]

The editors of the *University of Pennsylvania Law Review* began combining these two areas of study in 1975 by arguing that

> Th[e] view of freedom of the press as a particularized version of free speech omits an

5 Michael Schudson, *Why Democracies Need an Unlovable Press*, 13-17 (2008).

6 John H. Garvey & Frederick Schauer, *The First Amendment: A Reader*, eds., 57-58 (2002).

7 *See Open Meeting Statutes: The Press Fights for the Right to Know*, 75 Harv. L. Rev. 1199, 1204 (1962).

8 Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 American Bar Found. Research J. 521 (1977).

9 Editors, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. Pa. L. Rev. 166, 170 (1975).

10 *Id.* (citing Tunis Wortman, *A Treatise Concerning Political Enquiry, and the Liberty of The Press* (1800)).

11 *Id.* at 171.

12 U.S. Const. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

13 *Id.* at 173 (citing Note, *The Right of the Press to Gather Information*, 71 Colum. L. Rev. 838, 840-43 (1971); *Nimmer, Introduction-Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?* 26 Hastings L. J. 639 (1975)).

14 Anderson, *supra* note 3, at 528.

15 *Id.* at 506.

16 Sonja R. West, *The Majoritarian Press Clause*, U. of Chicago Legal Forum: Vol. 2020, *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1672&context=uclf (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 (1803)).

17 *Id.* at 321–22 (citing *Marbury*, 5 U.S. (1 Cranch) at 174; First Nat'l Bank v. Bellotti, 435 U.S. 765, 800 (1978) (Burger, C.J., concurring) (describing the press freedom as "complementary to and a natural extension of Speech Clause liberty")).

18 *Id.* at 322. *See also* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025 (2011); RonNell Andersen Jones & Sonja West, *The U.S. Supreme Court's Characterizations of the Press: An Empirical Study*, University of Georgia School of Law Legal Studies Research Paper Forthcoming, University of Utah College of Law Research Paper No. 419 (2021).

19 Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. Rich. L. Rev. 1142, 1145 (2000).

20 *Id.* at 1142.

21 *Id.* at 1143.

Newsgathering, *continued on page 8*

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> information-gathering element.. . . However, there may be other rights peculiar to the functions of the press, not derivable from the free speech clause, which should be recognized. If so, the exercise of these rights should rest exclusively in the press, while rights of free speech, whatever the mode of communication, rest in the public.[22]

This article seeks to build on this work and further combine these two areas of scholarship. To begin doing so, the following section discusses a major shift in press freedom jurisprudence between 1971 and 1972, then considers court precedent at the federal and state levels, as well as negative effects arising from this change. This article will apply these conclusions to current events, specifically arrests, use of force, and prosecutions of journalists arising from their reporting on racial justice protests and demonstrations in 2020 and 2021.

II. *New York Times v. United States* (1971) versus *Branzburg v. Hayes* (1972)

In the course of 364 days, the Supreme Court ruled in *New York Times v. United States* (1971) and *Branzburg v. Hayes* (1972), both cases implicating freedom of the press. However, a major shift occurred between the decisions. In *New York Times v. United States*, popularly known as the *Pentagon Papers* case, the Court ruled in favor of the press. In *Branzburg*, the Court narrowly ruled against the press.

In *Pentagon Papers*, the Supreme Court focused on whether *The New York Times* and *The Washington Post* could publish a classified U.S. Department of Defense study detailing the history of U.S. activities in Vietnam. Military analyst Daniel Ellsberg had leaked the documents referred to as the Pentagon Papers.[23] After *The New York Times* published an initial news report based on the study, President Richard Nixon's administration attempted to stop further publication, arguing to two separate federal circuit courts that a prior restraint was necessary to protect national security.

The Court ruled in a *per curiam* opinion that the Nixon administration had not overcome the "heavy presumption" against prior restraints.[24] In *Near v. Minnesota* (1931), the Court had previously held that the press' "constitutional right" to publish protected it from government imposition of prior restraints, except in very limited circumstances.[25] Taken together, those two cases established a strong presumption that prior restraints are unconstitutional under the First Amendment.

In a concurring opinion in *Pentagon Papers*, Justice Black provided a robust repudiation of prior restraints on the press by the government. He wrote,

> In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press would remain forever free to censure the government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government.[26]

Justice Black emphasized the importance of the press' functions, as well as its central role in U.S. democracy and society. Additionally, Justice Black also emphasized the need for the press to be independent from the government in order to inform and serve the American public. This concurring opinion would prove to be Justice Black's final opinion on the Supreme Court. Less than five months later, he resigned from the Court, and died shortly thereafter. Justice Powell then took Black's seat on the Court beginning in January 1972.

Almost exactly one year after the Supreme Court decided *New York Times v. United States*, *Branzburg* focused on the issue of a reporter's privilege against compelled disclosure of confidential sources and information.[27] Paul Branzburg, a writer for *The Louisville Courier-Journal*, published two stories concerning illicit drug use and manufacture in Kentucky. His sources asked not to be identified.[28] In a similar case, Earl Caldwell, a reporter for *The New York Times*, was given extraordinary access to covert Black Panther meetings, during which he interviewed several members.[29] In a third case, Paul Pappas, a television reporter based in Massachusetts, also reported on the Black Panthers after spending several hours at their headquarters.[30] All three journalists were subpoenaed to testify before separate grand juries about illegal activities they might have witnessed. They refused to do so and were found in contempt.[31] The question for the Supreme Court was whether journalists should be held to the same standard as members of the public regarding subpoenas and grand jury testimony, including disclosure of confidential source information.[32]

The plurality opinion, written by Justice Byron White, sided against the press. White held that because members of the general public are not constitutionally immune from testifying before a grand jury under a subpoena, this same standard should be applied to members of the press.[33] This narrow ruling declined to recognize a special privilege for the press under the First Amendment.[34] Such a special privilege would have most directly implicated journalists' source relationships and work materials, critical components of newsgathering.

However, the Court did conclude that "news gathering is not without its First Amendment protections,"[35] adding, "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[36] However, as subsequent jurisprudence demonstrates, any claim of a First Amendment right for newsgathering is generally "empty rhetoric." [37]

Significantly, Justice Powell filed an ambiguous concurrence:

> [T]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal

22 Editors, *supra* note 9, at 174 (citing 1 Annals of Cong. 452 (1789) (remarks of James Madison)).
23 New York Times v. United States, 403 U.S. 713 (1971).
24 *Id.* at 714.
25 Near v. Minn., 283 U.S. 697, 714–16 (citing Patterson v. Colorado, 205 U.S. 454, 462 (1907); Respublica v. Oswald, 1 U.S. 319 (1788)).
26 *Id.* at 717 (Black, J. concurring).
27 Branzburg v. Hayes, 408 U.S. 665 (1972). *See also* Scott Memmel, "Defending the Press: The Shield that Sets Minnesota Apart," Commc'n L. Rev. 19, no. 1 (2019): 4-5.
28 *Branzburg*, 408 U.S. at 668–69.
29 *Id.* at 675.
30 *Id.* at 672.
31 *Id.* at 679.
32 *Id.* at 697.
33 *Id.* at 682.
34 *Id.* at 709.
35 *Id.* at 707.
36 *Id.* at 681.
37 Chemerinsky, *supra* note 19.

> conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.[38]

Although joining the plurality under this set of facts, Powell seemed inclined to recognize that there might be other situations in which journalists could receive special testimonial privileges not available to the public. Nevertheless, the holding came down as 5-4 against press interests, setting the stage for additional Supreme Court rulings to do the same using the reasoning in *Branzburg*.

In less than one year, the Supreme Court issued two very different rulings related to the First Amendment and freedom of the press. What happened to cause this change? Certainly, the two cases were based on entirely different sets of facts and focused on different areas of First Amendment jurisprudence. But both involve the scope of protections for newsgathering and reporting under the First Amendment. In the interim, there was a noticeable shift in the composition of the Court. Given Justice Black's absolutist First Amendment views, as demonstrated by his concurring opinion in *Pentagon Papers*, it is likely that *Branzburg* would have come down differently had he still been on the Court. This is especially the case given Justice Powell's ambiguous concurrence, which tipped the scales in ruling against the press.

III. Court Precedent

The Supreme Court subsequently cited *Branzburg* in declining to extend to the press special privileges not available to members of the public. The Court did so in several different areas primarily related to newsgathering, including 1) newsroom searches and seizures; 2) liability under laws of general applicability, including invasion of privacy, criminal trespass, and wiretapping; 3) access to information; and 4) access to locations, including prisons, as well as crime, emergency, and disaster scenes. Particularly in cases involving locational access, a line of precedent developed in which federal and state courts favored law enforcement interests over those of the press.

A. Newsroom Searches and Seizures

The first area where the Supreme Court declined to extend a First Amendment privilege to the press in relation to newsroom searches and seizures[39] was in *Zurcher v. Stanford Daily* (1978).[40] Citing *Branzburg*, specifically Justice Powell's concurrence, the Court did "not support the view that the Fourth Amendment contains an implied exception for the press, through the operation of the First Amendment."[41] The Court added,

> Nor are we convinced, any more than we were in *Branzburg* . . . that confidential sources will disappear and that the press will suppress news because of fears of warranted searches. Whatever incremental effect there may be in this regard if search warrants, as well as subpoenas, are permissible in proper circumstances, it does not make a constitutional difference in our judgment.

Thus, *Zurcher* marked a key instance in which the Court not only declined to extend a special privilege to the press, but used *Branzburg*, among other cases and reasoning, as its justification for doing so.

B. Laws of General Applicability

In *Cohen v. Cowles Media Co.* (1991), the Court ruled that "[g]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[42] Here, the Court concluded that the First Amendment did not bar the press from being sued under a promissory estoppel theory after two newspapers broke an oral contract promising confidentiality to Republican campaign associate Dan Cohen. Cohen had approached several media outlets with allegations that the Minnesota Democratic-Farmer-Labor Party candidate for lieutenant governor had been previously convicted of shoplifting, on condition that his identity not be revealed. In reaching its ruling, the Court cited instances of the press not receiving special privileges, including in *Branzburg*.[43]

Being subject to laws of general applicability also arises in the context of privacy, criminal trespass, and wiretapping. A seminal case is the Ninth Circuit's ruling in *Dietemann v. Time* (1971), in which the Ninth Circuit held that the First Amendment "is not a license to trespass, steal, or intrude by electronic means into home or office."[44] Similarly, in *Food Lion, Inc. v. Capital Cities/ABC, Inc.* (1999), the Fourth Circuit held that reporters who gain access to private facilities under false pretenses for newsgathering purposes are not protected by the First Amendment and may be liable for claims including criminal trespass.[45] The court cited *Cohen* and held that the ruling outweighed the *Branzburg dicta* that "without some protection for seeking out the news, freedom of the press could be eviscerated."[46] State courts have also ruled against the press in some cases where undercover reporting led to claims of invasion of privacy [47] and criminal trespass.[48]

C. Access to Locations and Information; Weighing Press vs. Law Enforcement Interests

The Supreme Court and lower courts have also used *Branzburg* to conclude that the press does not have a special right of access to a variety of newsworthy locations, including prisons and jails, as well as crime, disaster, and emergency scenes. Significantly, a related line of federal and state court precedent developed that weighs law enforcement interests over those of the press.

First, the Court held in a series of cases that the press does not have a First Amendment right to access prisons and prisoners. In *Pell v. Procunier* (1974), the Court cited *Branzburg* in holding that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.[49] The Court also held that the First Amendment "does not . . . require government to accord the press special access to information," such as interviews with prison inmates.[50] The Supreme Court similarly refused to

38 *Branzburg*, 408 U.S. at 710 (Powell, J. concurring).
39 Zurcher v. Stanford Daily, 436 U.S. 547, 550 (1978).
40 *Id.* at 567–68.
41 *Id.* at n. 3 (citing *Branzburg*, 408 U.S. at 709–10 (Powell, J. concurring)).
42 Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).
43 *Id.*
44 Dietemann v. Time, Inc., 449 F.2d 245, 249 (9th Cir. 1971).
45 Food Lion v. Capital Cities/ABC, 194 F.3d 505 (4th Cir. 1999). *See also* United States v. Maldonado-Norat, 122 F. Supp. 2d 264 (D.P.R. 2000).
46 *Food Lion, Inc.*, 194 F.3d at 520 (citing *Branzburg*, 408 U.S. at 681).
47 *See e.g.* Shulman v. Group W Productions, Inc., 955 P.2d 469, 475 (Cal. 1998); Sanders v. ABC, 978 P.2d 69 (Cal. 1999).
48 *See e.g.* Arizona v. Wells, No. LC2003000566001DT, 2004 WL 1925617 (Ariz. Super. 2004); Stahl v. Oklahoma, 665 P.2d 839, 840 (Okla.App. 1983).
49 Pell v. Procunier, 417 U.S. 817, 834 (1974). *See also* Saxbe v. Washington Post Co., 417 U.S. 843 (1974).
50 *Pell*, 417 U.S. at 819.

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provide the press special access to prisons and prisoners in *Saxbe v. Washington Post Co.* (1974), which the Court found that the case was "constitutionally indistinguishable" from *Pell*.[51]

In *Houchins v. KQED* (1978), reporters at KQED, a public television station, asked to visit the Greystone facility at a county jail where maltreatment and suicides had occurred.[52] The sheriff denied access, instead setting up preplanned tours for the public and the press on a first-come-first-serve basis. The tours would not have passed through the Greystone facility.[53] The Supreme Court held that the press could not demand a right of access to a county jail greater than that of members of the public,[54] even when a journalist sought to "interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers, radio, and television."[55] As part of its reasoning, the Court cited *Branzburg*, holding that it "offer[ed] even less support for the respondents' position" that a special right of access "flows logically from our decisions construing the First Amendment."[56] The Court also noted that the "public's interest in knowing about its government is protected by the guarantee of a Free Press, but the protection is indirect. The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[57]

Second, the Court had found in *Branzburg* that journalists "have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."[58] The U.S. Court of Appeals for the Ninth Circuit applied this reasoning in *Chavez v. City of Oakland* (2011)."[59]

The Tenth Circuit also declined to extend a special right of access to locations and information. *Mazzetti v. United States* (1975) arose when newspaper reporter Michael Mazzetti was sentenced to fifteen days in jail after being found in contempt under 18 U.S.C. § 401(3).[60] Mazzetti had "persistently tak[en] photographs of federal prisoners and other photographs in prohibited areas of the federal courthouse premises at Leavenworth, Kansas" in violation of Rule 18, a local court rule.[61] Mazzetti claimed that Rule 18 violated the First Amendment and was constitutionally overbroad.[62] However, the Tenth Circuit held that the statute was a "reasonable . . . due-process mandate" that preserves a fair trial. The court therefore rejected Mazzetti's claim that "his status as a newsman should carry a special first amendment impact," finding that "[t]he suggestion as a generality has been negated in [*Saxbe*]."[63] The court added that "most certainly a newsman in the circumstances of this case has no special right to foster a disturbance or create news himself."[64]

Another line of related precedent holds that the press cannot interfere with — meaning inhibit, hinder, or otherwise obstruct — law enforcement even in the course of activities protected by the First Amendment. This rationale can be traced back to *Branzburg*, where the Court held that it could not "entertain . . . the theory that it is better to write about crime than to do something about it."[65]

New Jersey v. Lashinsky (1979) arose when *Star-Ledger* photographer Harvey I. Lashinsky took several photographs at the scene of a serious car accident, thinking it was "a 'spot news event' worthy of coverage[.]"[66] Soon after, New Jersey State Police Trooper Eric Herkloz arrived at the scene where an addition 40-50 people had also gathered. Herkloz ordered everyone to clear the area after he noticed that gas, oil, and transmission fluid were leaking from the vehicle.[67] He also wished to preserve the scene for investigation as the driver of the vehicle had been killed and her daughter seriously injured.[68] Lashinsky initially did not leave the scene. After he was individually asked to "please leave the scene," he stepped back only five feet. Despite showing his press card — which was issued by the state police — to Herkloz, he was ordered one final time to leave. Although Lashinsky claimed that Herkloz arrested him immediately, witnesses alleged that the arrest came after Lashinsky "engaged the trooper in a heated argument . . . during which Lashinsky hurled expletives at Herkloz and told the officer to go away and do his own job and let Lashinsky do his."

The New Jersey Supreme Court first concluded that there was "ample evidence from which to conclude that the defendant impeded the trooper in the performance of his duties."[69] However, the Court also acknowledged that two additional photographers, one from the New Jersey Highway Authority and one from the state police, arrived, one of whom was allowed to stay by Herkloz. The trooper reasoned that the photographer was "supposed to be out there to take pictures of the accident.. . . It was the man's job."[70]

Second, Lashinsky claimed that he "did not directly, physically interfere with the officer's movement" and "did not have the specific intent to interfere with the officer"[71] in violation of the New Jersey disorderly persons statute, N.J.S.A. 2A:170-29(2)(b), which "forbids an individual to obstruct, molest or interfere with another person who is lawfully in any place."[72] The Court held that the statute did not require that the prohibited conduct be physical in nature,[73] and also ruled that the statute did not require specific intent but rather that the conduct "be truly obstructive."[74] Additionally, the Court found that "the statute [did] not suffer from constitutional overbreadth or vagueness."[75]

Finally, the Court rejected Lashinsky's assertion that the statute "does not in these circumstances reach him by virtue of his status as a member of the press."[76] The Court acknowledged that it had "declared that the right of the press to gather news is entitled to special constitutional protection" and cited the finding in *Branzburg* that "newsgathering is not without its First Amendment protections."[77] The Court also noted that any limitations placed on a journalist's "constitutional prerogatives must take into account the unique role of the press in public

51 Saxbe v. Washington Post Co., 417 U.S. 843 (1974).
52 Houchins v. KQED, 438 U.S. 1, 14 (1978) (plurality opinion). *See also* Matthew Schafer, *Does Houchins Matter* (April 16, 2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827906.
53 *Houchins*, 438 U.S. at 5.
54 *Id.* at 15.
55 *Id.* at 3.
56 *Id.* at 7, 10.
57 *Id.* at 3.
58 *Branzburg*, 408 U.S. 665 at 684–85.
59 Chavez v. City of Oakland, 414 Fed.Appx. 939 (9th Cir. 2011).
60 Mazzetti v. United States, 518 F.2d 781 (10th Cir. 1975).
61 *Id.* at 782.
62 *Id.*
63 *Id.* at 783.
64 *Id.*
65 *Branzburg*, 408 U.S. at 692.
66 New Jersey v. Lashinsky, 81 N.J. 1, 6 (1979).
67 *Id.* at 6–7.
68 *Id.* at 7.
69 *Id.*
70 *Id.* at 8.
71 *Id.* at 8-9.
72 *Id.* at 9.
73 *Id.* at 9.
74 *Id.* at 10-11.
75 *Id.* at 19.
76 *Id.* at 13.
77 *Id.* (citing *Branzburg*, 408 U.S. at 681, 707).

life."[78] Furthermore, the Court recognized that "[a]n officer should, if made aware of the identity and status of an individual as a newsperson engaged in gathering news, be mindful that such an individual has a legitimate and proper reason to be where he is and, if possible, this important interest should be accommodated."[79]

However, the Court emphasized that "the constitutional prerogatives of the press," including newsgathering, must be balanced with "other important and legitimate government interests."[80] The Court continued, "The liberty which the press seeks to assure our people can be meaningfully enjoyed only in a society where there is an adequate measure of order."[81] The Court also made clear that the First Amendment "does not serve to place the media or their representatives above the law," meaning journalists and news organizations "are subject to law, as any citizen. The converse proposition would be intolerable."[82]

The Court therefore balanced the "competing values" between the press and law enforcement to determine the "reasonableness" of the restriction of a journalist's activities[83] and concluded that Herkloz's order to Lashinsky was reasonable "from an objective standpoint and under all of the circumstances . . . even taking into account the special role performed by the press."[84] Lashinsky's "obstreperous" actions, according to the Court, "impeded the trooper [who,] virtually working alone, could not, in his professional judgment, have permitted defendant to remain, even as a member of the press, and still discharge his own paramount responsibilities for the safety and welfare of those who were his immediate concern." Lashinsky was therefore obligated to follow the order and his failure to do so "was plainly unlawful[.]" Thus, the Court favored the law enforcement interests in this case over those of Lashinsky and newsgathering more broadly, rejecting First Amendment protection for press access when a journalist violates police orders and potentially interferes in law enforcement functions.[85]

However, Justice Morris Pashman took a different view in a dissenting opinion, writing that because Lashinsky "was a news photographer engaged in the task of reporting a newsworthy event," the order for him to leave was unreasonable.[86] Justice Pashman first reasoned that Lashinsky, and journalists in general, do "not visit the scene of a crime or an accident simply for [their] own edification," but instead "to gather information to be passed along to the public at large."[87] Second, Justice Pashman acknowledged that press cards do "not purport to grant newsmen a [c]arte blanche to wander wherever they may choose."[88] However, he found that the "only 'interference' caused [to] Trooper Herkloz by defendant consisted of defendant's photographing of the scene of the accident."[89] Third, Justice Pashman reasoned that Lashinsky, "as a card-carrying member of the press" was capable of evaluating the safety risk at the accident scene.[90] Finally, Justice Pashman concluded that the majority's ruling "in effect allows the police to remove any newsman from the scene of any accident merely because that newsman is competently performing his job. As such, the press's right of special access is rendered meaningless."[91]

Some courts have held that journalists do have a First Amendment right to cover news at crime, accident, or disaster scenes. For example, in *Westinghouse Broadcasting Corporation v. National Transportation Safety Board* (1982), the First Circuit concluded that law enforcement's limits on access to a plane-crash site impinged on "the constitutional right of the [press] to obtain news."[92] However, these courts make clear that members of the press retain that right only so long as they do not interfere with law enforcement activities. For example, in *Gazette Publishing Co. v. Cox* (1967), the Southern District of Indiana held that journalists "have a constitutional right not to be interfered with" by law enforcement so long as they "do not unreasonably obstruct or interfere with . . . official investigations of physical evidence or gain access to any place from which the general public is prohibited for essential safety purposes."[93]

In a more recent line of cases, several federal circuit courts have held that the press and public both have a First Amendment right to record police officers in the course of their duties in public places — provided they do not interfere with police activities. The first such ruling was by the Eleventh Circuit in 2000, holding that the "First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."[94]

In 2011, the First Circuit held that recording public officials engaged in their duties in a public space "is a basic and well-established liberty safeguarded by the First Amendment."[95] However, the court also held, significantly, that the First Amendment does not apply if the bystander directly interferes with law enforcement activity. In 2012, the Seventh Circuit enjoined enforcement of an Illinois eavesdropping law because it "likely violate[d] the First Amendment" by prohibiting people from making audio recordings of the police in public.[96] The following year, the Ninth Circuit recognized a First Amendment right to photograph police,[97] citing its ruling in *Fordyce v. Seattle* (1995), which found that "a genuine issue of material fact exist[ed] regarding whether [the plaintiff] was assaulted

78 *Id.* The Court noted that "[r]estrictions which fail to give proper weight to the importance of the news and those who gather it and which are not necessary to accommodate any other legitimate governmental concerns would have no justification." *Id.*
79 *Id.* at 14.
80 *Id.* at 13.
81 *Id.* The Court cited the finding in *Houchins* that "the First Amendment's concern that the public be optimally informed could in some instances render unreasonable restraints upon the scope of access to members of the press even where it would not be unreasonable to exclude the general public." *Id.* at 14.
82 *Id.* at 14.
83 *Id.* at 14.
84 *Id.* at 15.
85 Scott Memmel, Pressing the Police and Policing the Press: The History and Law of the Relationship Between the News Media and Law Enforcement in the United States (2020) (Ph.D. dissertation, University of Minnesota), *available at* https://conservancy.umn.edu/handle/11299/216360.
86 *Lashinsky*, 81 N.J. at 24 (Pashman, J. dissenting).
87 *Id.* Justice Pashman added, "It is precisely for this reason that the framers of the First Amendment accorded news media representatives a special right both to acquire and disseminate the news." *Id.*
88 *Id.* at 26.
89 *Id.* Justice Pashman added, "In no other respect did defendant, who was 15 to 20 feet away from the wreck, "obstruct" Herkloz in the performance of his duties. Consequently, Herkloz's order that defendant leave the site was clearly unreasonable." He also noted that the argument between the photographer and trooper came "after and as a direct result of Herkloz's order that defendant move on." *Id.* at 27.
90 *Id.* at 29.
91 *Id.*
92 Westinghouse Broadcasting Corp. v. Nat'l Transp. Safety Bd., 670 F.2d 4 (1st Cir. 1982).
93 Gazette Publishing Co. v. Cox, Case No. IP 65-C-528 (S.D. Ind. 1967). *See also* Connell v. Town of Hudson, 733 F.Supp. 465, 468 (D.N.H. 1990).
94 Smith v. Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).
95 Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011).
96 ACLU of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012).
97 Adkins v. Limtiaco, 537 Fed.Appx. 721, 722 (9th Cir. 2013).

Newsgathering, *continued on page 12*

Newsgathering, *continued from page 11*

and battered by a Seattle police officer . . . to prevent or dissuade him from exercising his First Amendment right to film matters of public interest" and gather news.[98] In 2017, the Fifth Circuit ruled that "the principles underlying the First Amendment support the particular right to film the police," although the right is not absolute.[99] The same year, the Third Circuit also held that bystanders have a First Amendment right to record on-duty police officers in public places.[100]

Significantly, these cases represent judicial recognition that the press and public have a First Amendment right to observe and record police, even over their objections, as long as they do not interfere with police operations. In an interview with the Poynter Institute for Media Studies, media attorney Robb Harvey emphasized that journalists cannot interfere with police activity because "[e]very state . . . has some statute on the books making it a crime to interfere with or obstruct official police business."[101]

Furthermore, courts can, and have, favored law enforcement interests over those of the press, such as in *Lashinsky* where the Tenth Circuit held that a state trooper had reasonably ordered that a photographer leave an accident scene despite his performing of constitutionally-protected activities. Another example is *United States v. Matthews* (2000), in which the Fourth Circuit held that the First Amendment did not provide a defense for freelance journalist Larry Matthews, who claimed to be investigating the distribution of child pornography online when he was arrested and charged by the FBI with trafficking such content in violation of the child pornography law, Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 22.[102] The court affirmed the ruling of U.S. District Court for the District of Maryland Judge Alexander Williams, Jr., who, in rejecting the argument that Matthews' online activities were protected by the First Amendment, favored the law enforcement interest in protecting children from exploitation over the press' newsgathering function.[103] Williams cited *Branzburg* as authority, explaining that the Court "examined both the expected burden on news gathering and the important role of the grand jury in effective law enforcement, and concluded that the public's interest in law enforcement was sufficient to override the burden imposed."[104] Williams ultimately held that the press' interest in investigations and newsgathering involving online child pornography "is insignificant compared to the government's interest in preventing the exploitation of children."[105]

Ultimately, existing case law "protect[s] press access [to physical locations] from unreasonable restriction."[106] However, court precedent stemming from *Branzburg* also makes clear that the press does not receive a special right of access to locations not accessible to the general public. As a consequence, despite the *dicta* in *Branzburg*, the high court has declined to extend First Amendment protection to newsgathering as a practical matter. Effectively, this line of court precedent favors law enforcement interests over newsgathering.[107]

D. Summary

As this overview demonstrates, the press does not receive special protections not available to the public under the First Amendment. Whatever special privileges they may enjoy are found outside of constitutional protections, such as through press credentials, statutory and common law protections for the reporter's testimonial privilege, and statutes such as the Privacy Protection Act (PPA), which provides journalists with qualified protection from searches and seizures by law enforcement of unpublished work product and documentary materials.[108] Additionally, at least three states' laws grant the press a qualified right of access to emergency and disaster scenes, including California, Ohio, and Alaska.[109]

There may be a legal remedy if law enforcement arrests a journalist for covering the news, rather than for breaking a generally-applicable law. Journalists may bring a civil rights claim under 42 U.S.C. §1983, known as a "§1983 action," against police for interfering with their ability to gather news.[110] However, it can be challenging for journalists to establish that police actually interfered with newsgathering as contrasted with whether the journalists were interfering with law enforcement activities.[111] Thus, successful §1983 actions, as well as defenses against prosecutions for breaking generally-applicable laws, can be an uphill battle in the absence of court precedent specifically protecting newsgathering.

Branzburg was not the first case decided by the Supreme Court denying journalists special rights of access to locations and information.[112] However, it marked a departure from the pro-press ruling in *New York Times v. United States* (1971). Additionally, the case and its reasoning were cited in subsequent Supreme Court and lower court rulings that also declined to recognize special protections for the press, often favoring police interests over those of the press. As discussed below, this allows for greater intrusion by government and law enforcement into press activities and independence, including through arrests, use of force, and prosecutions.

98 Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995). *See also* Askins v. U.S. Dept. of Homeland Security, 899 F.3d 1035 (9th Cir. 2018) (holding that the right to record police extends to border agents).
99 Turner v. Driver, 848 F.3d 678 (5th Cir. 2017).
100 Fields v. Philadelphia, 862 F.3d 353 (3rd Cir. 2017).
101 Al Tompkins, *What to Do When Police Tell You to Stop Taking Photos, Video*, Poynter, (June 9, 2010), *available at* https://www.poynter.org/reportingediting/2010/what-to-do-when-police-tell-you-to-stop-taking-photos-video/.
102 United States v. Matthews, 209 F.3d 338, 350 (4th Cir. 2000).
103 United States v. Matthews, 11 F.Supp.2d 656, 661 (D.Md.1998).
104 *Id.* (citing *Branzburg*, 408 U.S. at 690–91, 695).
105 *Id.* at 663.
106 "What Rights Do Journalists Have at Accident or Disaster Scenes?," *Freedom Forum Institute*, accessed Feb. 19, 2020, https://www.freedomforuminstitute.org/about/faq/what-rights-do-journalists-have-at-accident-or-disaster-scenes/.
107 *See Mazzetti*, 518 F.2d at 781; *Lashinsky*, 81 N.J. at 1; *Connell*, 733 F.Supp. at 466, 470; *Fields*, 862 F.3d at 360; *Turner*, 848 F.3d at 678; *Glik*, 655 F.3d at 84.
108 Privacy Protection Act, 42 U.S.C. § 2000aa *et seq.* (1980). The PPA defines "work product" as materials created "in anticipation of communicating such materials to the public," including conclusions, opinions, or theories. "Documentary materials" are those "upon which information is recorded," such as written materials, photographs, and electronically recorded tapes or discs. *See also The Privacy Protection Act of 1980*, Electronic Priv. Info. Center, accessed June 25, 2019, https://epic.org/privacy/ppa/.
109 Cal. Penal Code § 409.5(a) (2004); Ohio Rev. Code Ann. § 2917.13(B) (2004); Alaska Stat. § 26.23.200(2) (2004).
110 *See* Kelly Weill, *ACLU Sues D.C. Police Over Journalist's Inauguration Arrest*, Daily Beast (June 23, 2017), *available at* https://www.thedailybeast.com/aclusues-dc-police-over-journalists-inauguration.
111 Jonathan Peters, *Journalists in Ferguson: Know your rights*, Columbia Journalism Rev., Aug. 21, 2014, https://archives.cjr.org/united_states_project/press_rights_in_ferguson.php.
112 *See e.g.* Zemel v. Rusk, 381 U.S. 1, 16–17 (1965); Grosjean v. American Press Co., 297 U.S. 233, 250 (1936); Associated Press v. NLRB, 301 U.S. 103 (1937); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 192–93 (1946); Associated Press v. United States, 326 U.S. 1 (1945); Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

IV. Negative Effects

The lack of special privileges for the press, coupled with courts favoring law enforcement interests over those of the news media, have resulted in several negative effects on the press' important purposes and functions tied to gathering news. These negative effects have continued through 2021. This necessitates action.

First, the lack of special privileges regarding access to locations and information limits newsgathering. Put simply, the press' ability to gather news is hindered when journalists are restricted as to where they can go and what information they can obtain. Certainly, journalists cannot go wherever they please, but limiting access is especially problematic when it relates to covering matters of public concern, especially when access to locations and information would be unlikely to have a detrimental effect on police activities. Furthermore, it can result in increased reliance on the whim of government officials to grant access to locations and information, which raises concerns about supposedly independent media promulgating the "official version" of events and neglecting the perspective of underrepresented communities.[113]

Second, *Branzburg* declined to recognize a First Amendment-based absolute privilege against disclosure of confidential sources and information. Some protections do exist, largely under statutory and common law, with only a few federal circuit courts recognizing a First Amendment reporter's privilege.[114] In any event, the messy legal landscape can undermine source relationships because journalists may not be protected from compelled disclosure even under statutory law. At the very least, this uncertainty may deter journalists and/or their sources from making promises of confidentiality, meaning fewer people would be willing to talk to the press and consequently, that the public will be deprived of valuable information.

Third, the lack of special protections for journalists can lead to a chilling effect on reporting. In particular, the legal landscape allows for police to arrest journalists engaged in newsgathering if there is even a modicum of interference in police activities. Journalists have also been the target of law enforcement threats and use of force, including being tackled to the ground or being hit with rubber bullets, pepper balls, or tear gas, in the course of newsgathering. Put simply, if journalists are detained, in jail, or in the hospital, they cannot report on important newsworthy events in the short term. In the long term, in the face of these threats to their physical safety and wellbeing, journalists may be less willing or able to report from future chaotic scenes where police are involved. The chilling effect is only exacerbated by the prospect of lengthy and costly legal battles to vindicate press rights.

Finally, the lack of special privileges for the press bleeds into prosecutions of journalists, especially when charged with allegedly interfering with law enforcement. These cases are not a "slam dunk" because the absence of privileges for the press means the First Amendment is not a "get-out-of-jail free" card for anyone.[115] Furthermore, even when the press can cite First Amendment protection which the public also enjoys, courts can, and have, favored law enforcement interests over those of the press.

It is worth noting that law enforcement also faces potential negative consequences from arrests, use of force, and threats against members of the press, including risking negatively affecting their public image. Police departments, officials, and officers also face potential litigation under §1983 actions. Significantly, when the press and police are negatively affected, so too is the public. When the press and police cannot or do not adequately accomplish their important societal roles, they do not fully serve and benefit the public as they are meant to do.[116]

Each of the negative effects on the press and public interest arose with arrests, use of force, and prosecutions of journalists arising in the aftermath of the May 25, 2020 murder of George Floyd, a 46-year-old Black man, while in the custody of Minneapolis Police Department (MPD) officers.[117] At the time, Floyd's death was another in a series of police killings of Black men and women across the United States, a trend that has only continued.[118] In the days, weeks, and months following Floyd's death, peaceful and violent protests erupted across the country and internationally, sparked by efforts to draw attention to important racial justice issues.

Journalists from around the world covered the protests, reporting not only on what transpired during the protests, but also the messages of the demonstrators and the Black community. By reporting the law enforcement response to the protests, journalists were holding the police accountable. However, in the course of this reporting, members of the press faced arrests, attacks, and threats by law enforcement. According to U.S. Press Freedom Tracker, there were over 880 press freedom incidents amidst racial justice protests between May 2020 and January 2021 across at least 79 U.S. cities. They included at least 170 physical attacks of journalists by police and at least 115 arrests.[119]

Additionally, at least four journalists faced prosecutions after being arrested or detained at the protests around the death of Floyd. One such case targeted *Des Moines Register* reporter Andrea Sahouri, who was arrested at a racial justice protest following the death of Floyd.[120] Des Moines Police officer Luke Wilson alleged that he had no choice but to arrest Sahouri when she allegedly refused to leave an area after the officer deployed

113 *See* Paul Farhi & Elahe Izadi, *Journalists are reexamining their reliance on a longtime source: The police*, Wash. Post (June 30, 2020), https://www.washingtonpost.com/lifestyle/media/journalists-are-reexamining-their-reliance-on-a-longtime-source-the-police/2020/06/30/303c929c-b63a-11ea-a510-55bf26485c93_story.html.

114 *Absolute or qualified privilege*, Reporters Committee for Freedom of the Press, accessed Feb. 21, 2020, https://www.rcfp.org/privilege-sections/b-absolute-or-qualified-privilege/.

115 *See generally* Michael Kunzelman & Jacques Billeaud, *Some Jan. 6 defendants try to use journalism as riot defense*, AP (April 18, 2021), *available a*t https:// apnews.com/article/nm-state-wire-government-and-politics-journalismriots-70192823f35380b860b6f2708904bc5c.

116 Memmel, *supra* note 85.

117 For more information on Floyd's death, the ensuing protests, and actions taken against journalists by law enforcement, *see* Scott Memmel & Jonathan Anderson, *Special Report: Journalists Face Arrests, Attacks, and Threats by Police Amidst Protests Over the Death of George Floyd*, 25 Silha Bull. 3-15 (Winter/Spring 2020); Scott Memmel, *Ongoing Protests and Confrontations Between the Press and Police Prompt Legal Action, Ethical Debates, and Media Advocacy*, 26 Silha Bull. 10-17 (Fall 2020).

118 *See e.g.* Mara Klecker & Kim Hyatt, *Brooklyn Center police fatally shoot man, 20, inflaming tensions during the Derek Chauvin trial*, Star Tribune (April 12, 2021), https://www.startribune.com/brooklyn-center-police-fatally-shoot-man-20-inflaming-tensions-during-the-derek-chauvin-trial/600044821/.

119 *Press Freedom in Crisis*, U.S. Press Freedom Tracker, accessed April 3, 2021, https://pressfreedomtracker.us/george-floyd-protests/.

120 Kirstin McCudden, *Arrested for covering protests, four journalists are due in court this month*, Freedom of the Press Foundation, Feb. 25, 2021, https://freedom.press/news/arrested-covering-protests-four-journalists-are-set-face-trial-month/; William Morris, "'The jury made the right decision': Reporter Andrea Sahouri acquitted in trial stemming from arrest as she covered protest," Des Moines Register, March 10, 2021, https://www.desmoinesregister.com/story/news/2021/03/10/andrea-sahouri-trial-des-moines-register-reporter-acquitted-george-floyd-protest-arrest/6933780002/.

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Newsgathering, *continued from page 13*

pepper spray.[121] Sahouri countered that she repeatedly told Wilson she was a member of the press. Sahouri was charged with failure to disperse and interference with official acts. Her case, which was the first to go to trial in relation to the Floyd protests, ended after three days when a six-member jury acquitted her on both charges.

Several negative effects arose from Sahouri's arrest and prosecution. First, she endured physical violence by police, including being pepper sprayed and forcibly zip tied. Second, her ability to cover the protests and other stories was undermined because she was either detained or in a courtroom instead of out on the beat. Finally, her case implicates press freedom broadly as it may chill other reporters who might fear of retribution while covering similar newsworthy events. The prospect of long trials and burdensome legal fees can be especially problematic for smaller news outlets.

Taken together, these negative effects demonstrate how law enforcement and the government more broadly can, and do, intrude upon and interfere with newsgathering through arrests, use of force, and prosecutions. Significantly, such actions have continued throughout the first decades of the 21st century, including in relation to highly newsworthy events around racial justice protests. This is in large part attributable to a lack of special privileges and constitutional protections for newsgathering, coupled with the deference given to law enforcement by the courts.

V. Solutions

The protests following the death of George Floyd were incredibly significant in spreading racial justice messages across the United States. For this reason and others, Andrea Sahouri, and journalists like her, were present to cover them. Although protections for freedom of speech benefit members of the press, journalists undertake discrete actions that go beyond free speech and implicate the Press Clause.

On one hand, the legal landscape does provide protections for the press' interests. In the *Pentagon Papers* case, the Court recognized First Amendment protection from government censorship. The Court has also provided First Amendment protections for publication of lawfully obtained, truthful information.[122] Additionally, the Court has provided protection for circulation and dissemination of materials by the press under the First Amendment,[123] as well as First Amendment protection for print publications' editorial control.[124]

However, as detailed throughout this article, the Supreme Court has provided the press with little constitutional protection for newsgathering. It has declined to provide the press with special privileges related to access to information and locations, as well as against searches and seizures and liability under laws of general applicability. Thus, *dicta* by the Court about First Amendment protections for newsgathering, such as in *Branzburg*, are often empty rhetoric.[125] This is further reinforced by courts favoring law enforcement interests over newsgathering interests. Although §1983 actions do provide a theoretical legal remedy, and the press does receive some limited privileges and rights not available to members of the general public from other sources, more can be done to promote and protect newsgathering from government interference.

This article does not argue that the press should be allowed to interfere with law enforcement activities or have unlimited access to locations and information. But at the same time, there should be concern not just about press intrusion into law enforcement, but also police intrusion into newsgathering. That includes arrests, use of force, and threats when journalists are trying to do their jobs. As Justice Black wrote in his concurrence in *New York Times v. United States*, if the press is to serve the governed, the government cannot interfere with it. "Government" includes law enforcement.

Thus, courts need to give greater deference to press interests. Without meaningful First Amendment protections for newsgathering, government can, and will, continue to undermine the press' ability to cover noteworthy events, especially when the police are present. Prosecutors are not sufficiently deterred from targeting journalists like Sahouri with criminal sanctions. Legal defenses for newsgathering as they currently exist are not sufficient to guarantee a favorable outcome. In the Sahouri case, the journalist was acquitted. But what if a court or jury sides with police officers, citing a lack of First Amendment protections for newsgathering?

There are three tangible ways in which the courts and legislature, as well as members of the press and police, can begin to rectify the *Branzburg* precedent. First, judicial action is ideal. If the Press Clause is to have any meaning, there need to be ways and circumstances under which the press receives greater protections than the public in the course of newsgathering. This is not to say that these protections will be absolute. But the claim in *Branzburg* that newsgathering is not without First Amendment protection cannot be simply empty rhetoric. It needs to have practical application.

A potential judicial solution is temporary restraining orders (TRO) exempting journalists from curfews, dispersal orders or other police actions. This would prevent law enforcement from arresting or using force against members of the press who are covering protests. For example, on April 16, 2021, in the wake of protests arising from the deadly shooting of Daunte Wright by Brooklyn Center, Minn. police, federal Judge Wilhelmina M. Wright of the District of Minnesota issued a TRO preventing specific Minnesota law enforcement agencies from "arresting, threatening to arrest, or using physical force—including through use of flash bang grenades, non-lethal projectiles, riot batons, or any other means—directed against any person whom they know or reasonably should know is a Journalist . . ., unless [law enforcement has] probable cause to believe that such individual has committed a crime."[126] The order also exempted journalists from dispersal orders, including during curfews from which members of the press were already exempt.

Although Wright's order was a step in the right direction, it had several limitations. First, Wright acknowledged in

121 Tyler Kingkade, *Iowa reporter goes to trial over arrest during Black Lives Matter protest*, NBC News (March 8, 2021), https://www.nbcnews.com/news/us-news/iowa-reporter-goes-trial-over-arrest-during-black-lives-matter-n1260068.

122 *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Oklahoma Publishing Co. v. Oklahoma County District Court, 430 U.S. 308 (1977); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979); Florida Star v. B. J. F., 491 U.S. 524 (1989).

123 Ex parte Jackson, 96 U.S. 727, 733 (1877); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

124 Miami Herald v. Tornillo, 418 U.S. 241, 258 (1974). *See also* Arkansas Educational Television Commission v. Forbes, 523 U.S. 666, 674 (1998).

125 Chemerinsky, *supra* note 19.

126 Order Granting Plaintiffs' Motion for a Temporary Restraining Order, Goyette v. City of Minneapolis, No. 20-cv-1302 (WMW/DTS) (April 16, 2021), https://assets.documentcloud.org/documents/20618077/tro-minnesota-journalists-at-protests-goyette.pdf. *See also Members of the Press Detained and Targeted with Use of Force by Law Enforcement Despite Court Order Amid Racial Justice Protests*, Silha Center for the Study of Media Ethics & L. (April 19, 2021), https://hsjmc.umn.edu/news/2021-04-18-members-press-detained-and-targeted-use-force-law-enforcement-despite-court-order.

her order that similar injunctions necessarily included the requirement that journalists "refrain from impeding law enforcement activities." Her order, and those like it, related to dispersal orders, not to police activities more broadly. Second, the TRO did not apply to all law enforcement agencies, and at least a dozen different ones responded to the protests in Brooklyn Center. Finally, even if plaintiffs successfully obtain a TRO — which is not guaranteed — such court orders cannot and do not completely ensure that arrests, attacks, and threats will cease. Despite the District of Minnesota's TRO, law enforcement continued to arrest and detain journalists, some of whom were required to submit to photographs of their press credentials and faces. Other journalists were targeted by law enforcement use of chemical agents.

Justice John Paul Stevens' reasoning in *Houchins* is instructive. In his dissenting opinion, Justice Stevens contended that newsgathering *should* receive constitutional protection against government intrusion.[127] He wrote that the First Amendment protects "not only the dissemination but also the receipt of information."[128] Justice Stevens also asserted that it is "not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."[129] Therefore, Justice Stevens opined that "information gathering is entitled to some measure of constitutional protection."[130] By following Justice Steven's reasoning, the press would receive preferential treatment, or at least greater deference, in gathering news.

Second, if the Supreme Court and/or lower courts fail to recognize First Amendment protection for newsgathering function, Congress and state legislatures need to step in and pass legislation that will do so. In fact, there is precedent for Congress taking actions to protect press interests. In direct response to the Supreme Court's ruling in *Zurcher* denying journalists First Amendment protection that enhanced their existing Fourth Amendment rights, Congress passed the PPA to curtail searches and seizures in newsrooms.[131] Statutory protection for newsgathering, whether by Congress or state legislatures, would be a step in the right direction to prevent government intrusion into freedom of the press. Additionally, Congress could pass legislation restricting federal funding to law enforcement agencies that fail to take adequate steps to ensure they are not inappropriately arresting, attacking, or otherwise interfering with journalists who are gathering news.

Finally, and perhaps most realistically, change needs to happen "on the ground." Law enforcement across the United States needs to receive better training on how to interact with journalists at chaotic scenes like protests. Similar messages could also extend to public officials, who should speak publicly about the important and necessary role of newsgathering in the United States. Furthermore, scholars, advocacy groups, and others can, and should, bring together members of the press and police in different communities so that they can talk through their respective roles, differences and concerns, preferably before a crisis occurs. Ultimately, better training and communication between the press and police, as well as greater understanding and important purposes of newsgathering, can help prevent, even to a small extent, arrests, use of force, and prosecutions of journalists.

The Press Clause is not going to be revitalized overnight. Even if some or all of these proposed solutions are adopted, arrests, use of force, threats, and prosecutions of journalists in the context of newsgathering will not magically go away. But the status quo has become untenable as journalists continue to face these consequences for simply doing their jobs. Court precedent dating back to *Branzburg* in 1972 has failed to adequately protect newsgathering and has instead prioritized law enforcement functions. Law enforcement and government interests are important, but so too are those of the press and public. As it stands, law enforcement interests are often given too much deference in the absence of special privileges/protections for the press. Instead, in order to serve the public interest, the press should be able to cover protests lawfully without fear of arrest or prosecution for doing so. The legacy of *Branzburg* and its progeny — perhaps unintended — is that journalists do not have that assurance.

Ultimately, better balancing of the press' and law enforcements' interests benefits not only those institutions. Decreasing government intrusion into press freedoms also benefits the American public. Put simply, if the press cannot properly cover newsworthy events and report on police wrongdoing, it is the public that suffers. Without press reporting on protests, the public will not receive a complete view of what takes place, nor will important messages such as those related to racial justice be amplified for the public to hear. Furthermore, if the press cannot report, for example, on police use of force against protesters, the public will be deprived of an important accountability mechanism that can help lead to reform and change. Finally, by targeting members of the press, law enforcement further undermines public confidence and trust in it, making it even more challenging to properly serve the public, especially those from underrepresented communities. Taken together, the public needs the press and police to operate at their best, which is undermined when the two parties are in conflict.

* * *

Justice Black's departure from the Supreme Court in 1971 removed perhaps the most ardent defender of freedom of the press to ever sit on the Court. This led, in part, to a series of rulings where the high court refused to recognize special privileges for newsgathering under the First Amendment. One result was that, in some cases, lower courts favored law enforcement interests over those of the press, allowing for greater government intrusion into newsgathering. This interference continues to lead to negative effects and harms, especially where journalists are arrested, jailed, and/or prosecuted for doing their jobs. This includes at racial justice protests where the press should be able to cover the crucially important messages from underrepresented communities, as well as to help the public hold law enforcement accountable. If action is not taken to address these harms, journalists will continue to be targeted by law enforcement, and face other forms of government interference. Ultimately, only by providing greater protections for newsgathering can Justice Black's call for a "free and unrestrained press" fully come to fruition.

— Scott Memmel
Postdoctoral Associate

127 *Houchins*, 438 U.S. at 32 (Stevens, J. dissenting).
128 *Id*. at 30.
129 *Id.* at 32. Justice Stevens cited Justice William Brennan's concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301 (1965): "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." Stevens added, "It would be an even more barren market-place that had willing buyers and sellers and no meaningful information to exchange."
130 *Id*.
131 42 U.S.C. § 2000aa-7(a).

Content Moderation and Constitutional Hurdles: First Amendment Limitations on Platform Regulation

On May 5, 2021, the Facebook Oversight Board, the body created by Facebook to resolve the company's content removal decisions, issued its ruling on the indefinite suspension of President Donald Trump from the platform.[1] Although the Oversight Board concluded that the initial decision to suspend President Trump following the January 6 insurrection was justified, the Board took issue with the platform's "arbitrary"[2] procedure in doing so. Instead of making the suspension final, it kicked back that determination to Facebook.[3] On June 4, 2021, Facebook announced that it would suspend Trump's accounts for at least two years.[4] Legal experts, media analysts, and politicians on both sides of the aisle aired their grievances about the Board's ruling, adding to an ongoing debate: do social media platforms do too little to combat a panoply of ills — misinformation[5], harassment, and polarization, to name a few — or too much, removing marginalized groups and even presidents.[6] Both alternatives underscore the same concern, however: private platforms' power over online speech and discourse.

In response to such concerns, several proposals have been introduced in the United States to curb how companies moderate their platforms. These proposals fall into three general approaches: (1) requirements that platforms host users and content with which they disagree; (2) modifications to Section 230, a federal statute that currently immunizes platforms from traditional speech torts, such as defamation, arising from user-generated content; and (3) limits on how platforms recommend or rank content to users. This article outlines each approach and highlights how each may come into conflict with the First Amendment.

I. Proposals Requiring Platforms Host Content

On April 5, 2021, the United States Supreme Court vacated a decision by the U.S. Court of Appeals for the Second Circuit in *Biden v. Knight* and instructed the lower court to dismiss the case as moot.[7] The Second Circuit had previously upheld a district court decision finding that then-President Donald Trump violated Twitter users' First Amendment rights when he blocked them from seeing or responding to his personal Twitter account, which he used for official business.[8] The Supreme Court's decision to vacate the Second Circuit was brief — one sentence — and unanimous. However, Justice Thomas took the opportunity to write a concurring opinion in which he reflected upon "the concentrated control"[9] of digital platforms. In a curious twist for the conservative justice, he mused on how the use of common carriage and public accommodation doctrines could be used to compel private, digital platforms to host content with which they disagree. "If part of the problem is private, concentrated control over online content and platforms available to the public, then part of the solution may be found in doctrines that limit the right of a private company to exclude," Justice Thomas wrote.[10]

Much of Justice Thomas's twelve-page concurrence explores whether platforms could be classified as common carriers in order to curb their ability to ban or suspend individuals. If a company is considered a common carrier, it is generally required to afford neutral, nondiscriminatory access to its services.[11] Justice Thomas argued that digital platforms may be akin to critical infrastructure such as toll bridges, railroads, or telephone networks that are classified as common carriers and must provide service to all customers alike, without discrimination.[12] Such regulations may be justified, Justice Thomas wrote, "when a carrier possesses substantial market power"[13] or when a "company holds itself out . . . as carry[ing] goods for everyone as a business."[14] Digital platforms are similar to traditional telephone infrastructure, Justice Thomas argued, because they "'carry' information from one user to another"[15] and "hold themselves out as organizations that focus on distributing the speech of the broader public"[16] — rather than speaking themselves. Thomas also noted that platforms have dominant market share due to "network effects"[17] that may allow for common carriage requirements. "[I]t stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of 'digital platforms,'" Justice Thomas argued.[18]

The concurrence echoes a growing concern raised by Republican politicians that platforms possess an "anti-conservative bias"[19] in removing content, and a belief that

1 Jack M. Balkin & Kate Klonick, *Facebook's Oversight Board was supposed to let Facebook off the hook. It didn't*, Wash. Post (May 6, 2021) https://www.washingtonpost.com/outlook/2021/05/06/facebook-oversight-board-trump/.

2 Facebook Oversight Board, Case Decision 2021-001-FB-FBR (May 5, 2021), *available at* https://www.oversightboard.com/decision/FB-691QAM-HJ.

3 *Id.* "The Board's role is to ensure that Facebook's rules and processes are consistent with its content policies, its values and its human rights commitments. In applying a vague, standardless penalty and then referring this case to the Board to resolve, Facebook seeks to avoid its responsibilities."

4 Mike Isaac & Sheera Frenkel, *Facebook Says Trump's Ban Will Last at Least 2 Years*, N.Y. Times (June 4, 2021), https://www.nytimes.com/2021/06/04/technology/facebook-trump-ban.html.

5 *See e.g.*, Paul Mozur, *A Genocide Incited on Facebook, With Posts From Myanmar's Military*, N.Y. Times (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html.

6 *See e.g.*, Mathew Ingram, *Social networks accused of censoring Palestinian content*, Columbia Journalism Rev. (May 19, 2021), https://www.cjr.org/the_media_today/social-networks-accused-of-censoring-palestinian-content.php.

7 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021), *available at* https://www.supremecourt.gov/opinions/20pdf/20-197_5ie6.pdf.

8 Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F. 3d 226 (2019).

9 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

10 *Id.*

11 *See e.g.*, U.S. Telecom Ass'n v. Fed. Commc'n Comm'n 855 F.3d 381 (D.C. Cir. 2017).

12 Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

13 *Id.* at 4.

14 *Id.*

15 *Id.*

16 *Id.*

17 *Id.* at 7.

18 *Id.* (citing *Turner Broadcasting Sys. Inc. v. FCC*, 114 S. Ct. 2445 (1994) (O'Connor, J., dissenting)). *See infra* note 33 and accompanying text.

19 David McCabe, *Evidence of anti-conservative bias by platforms remains anecdotal*, N.Y. Times (Oct. 28, 2020), https://www.nytimes.com/2020/10/28/technology/evidence-of-anti-conservative-bias-by-platforms-remains-anecdotal.html.

regulation is needed to ensure that platforms act "neutrally" in their content moderation practices. For example, on May 24, 2021, Florida Gov. Ron DeSantis signed a Social Media Platform bill that would fine social media companies $25,000 to $250,000 per day for removing Florida political candidates from their platforms.[20] Three days later, trade industry groups NetChoice and the Computer and Communications Industry Association (CCIA), whose members include Twitter and Facebook, filed a lawsuit in the U.S. District Court for the Northern District of Florida challenging the law on First Amendment grounds. The complaint argued that the law's restrictions on content moderation violate platforms' free speech "by compelling them to host — and punishing them for taking virtually any action to remove or make prominent — even highly objectionable or illegal content, no matter how much that content may conflict with their terms or policies."[21]

Laws that compel platforms to host users and content that they would otherwise take down are reminiscent of a set of rules that have previously applied to broadcast media called the Fairness Doctrine.[22] Established in 1949, the Fairness Doctrine required broadcasters to: (1) cover controversial issues of public importance, and (2) provide a diversity of perspectives on such issues.[23] At the time of the Doctrine's inception, few broadcasters were given government licenses to operate spectrum frequencies and policymakers were wary of broadcasters' propensity to air only messages with which they agreed.[24] Within this context, policymakers were particularly adamant that the medium must give listeners and viewers access to a diversity of viewpoints and topics. Although the Doctrine was largely eliminated in 1987, its approach has garnered support once again in today's environment of digital platforms with the capacity to inform a massive, global user-base.[25]

Proposed common carriage and pseudo-Fairness Doctrine regulations, such as requiring social media platforms to host certain users (as the Florida law imposes), would face an uphill constitutional battle, however. Courts have upheld such regulatory efforts only in situations where private companies either hold themselves out as neutral conduits of information, or when they possess critical control over access to a certain medium or technology. It is difficult to imagine modern day digital platforms falling under either classification.

A court most recently upheld common carriage requirements for telecommunications providers in the context of net neutrality. In 2015, the Federal Communications Commission issued the Open Internet Order, which formally classified internet service providers (ISPs) as common carriers and prohibited them from blocking or throttling lawful internet traffic.[26] In upholding the order,[27] Chief Judge Sri Srinivasan and Judge David S. Tatel of the U.S. Court of Appeals for the D.C. Circuit emphasized that ISPs could avoid the burdens of common carrier status provided they had exercised their First Amendment rights to curate their services. "[T]he rule does not apply to an ISP holding itself out as providing something other than a neutral, indiscriminate pathway — *i.e.*, an ISP making sufficiently clear to potential customers that it provides a filtered service involving the ISP's exercise of 'editorial intervention,'" the judges wrote.[28] But in this case, broadband providers had represented to their subscribers that their services would connect to "substantially all Internet endpoints."[29] The common carrier status and neutrality requirements thus "require[d] ISPs to act in accordance with their customers' legitimate expectations."[30]

Unlike ISPs, and contrary to Justice Thomas's characterization, most digital platforms do exercise "editorial intervention." Content moderation policies are often outlined in community standards guidelines, and platforms even market their content moderation preferences to attract users.

20 Act effective July 1, 2021, ch. 2021-32, 2021 Fla. Laws 7072, *available at* http://laws.flrules.org/files/Ch_2021-032.pdf. (The law would fine social media companies $25,000 per day for deplatforming Florida candidates for non-statewide office and $250,000 per day for deplatforming statewide candidates. The law also includes exemptions for "journalistic enterprises" as well as companies that own theme parks, such as Disney.); *See also*, Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2020) (A bill introduced requiring a company would have to prove by clear and convincing evidence that it does not, and did not in the preceding two-year period, moderate user content in a politically biased manner in order to receive Section 230 protection).

21 Complaint, NetChoice LLC v. Moody, N.D. Fla., No. 4:21-cv-00220 (May 27, 2021), *available at* https://www.bloomberglaw.com/public/desktop/document/NETCHOICELLCetalvMOODYetalDocketNo421cv00220NDFla-May272021CourtDo/1?1622212641.

22 I do not attempt to solve the normative arguments surrounding the Fairness Doctrine here. Some have argued that the Doctrine emphasized false equivalency on controversial issues, was perhaps used as a political tool for controversial viewpoints, and had a chilling effect on broadcasters' news coverage. However, on the other side, there exists arguments that the repeal of the Fairness Doctrine led to increased polarization of media, citing the rise of conservative radio as evidence. *See generally*, Philip M. Napoli, *Back from the Dead (Again): The Specter of the Fairness Doctrine and its Lessons for Social Media Regulation*, (forthcoming). It is unclear how such requirements would work at the scale needed for a large platform such as Facebook, however. *See, e.g.*, Mike Masnick, *Content Moderation At Scale Is Impossible: Recent Examples of Misunderstanding Context*, TechDirt (Feb. 26, 2021) https://www.techdirt.com/articles/20210225/10365146316/content-moderation-scale-is-impossible-recent-examples-misunderstanding-context.shtml.

23 The foundation for the Fairness Doctrine was outlined years prior in the Radio Act of 1927. The Act highlighted that at the time there was a scarcity of radio frequencies and therefore those broadcast stations that were granted a government license to operate must do so for the "public interest, convenience, and necessity" of the citizenry. Radio Act of 1927, 47 U.S.C. §§ 81-119 (1927). Shortly thereafter, the Federal Radio Commission (which later became the Federal Communication Commission in the Communications Act of 1934) put forth the view that "public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies…to all discussions of issues of importance to the public." 3 Great Lakes Broadcasting Co., 3 F.R.C. Ann. Rep. 32, 33 (1929), rev'd on other grounds, 37 F.2d 993, cert. dismissed, 281 U.S. 706 (1930). In 1938, a former radio employee named Lawrence J. Flynn challenged the license of radio stations WAAB and WNAC in Boston, asserting that the stations' owners were using the stations to air one-sided political viewpoints and attacks against politicians. Flynn created a company called Mayflower Broadcasting and tried to get the FCC to award him WAAB's license. The FCC refused. However, in doing so the commission made a ruling that came to be known as the Mayflower Doctrine which declared that radio stations must remain neutral in matters of news and politics and prohibiting them from giving editorial support to any particular political position or candidate. Mayflower Broadcasting Corp., 8 F.C.C. 333 (1941). The Mayflower rule prohibiting editorializing was later repealed in 1949 and replaced with the Fairness Doctrine. FCC, Report of the Commission in the Matter of Editorializing 1Y Broadcast Licensees (1949); *See also* Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10426 (1964).

24 *Id.*

25 *See generally* Philip M. Napoli, Social Media and the Public Interest (2019).

26 In the Matter of Protecting and Promoting the Open Internet (Protecting and Promoting the Open Internet), 30 FCC Rcd. 5601, 5607– 08 (2015).

27 U.S. Telecom Ass'n v. FCC, 855 F. 3d 381 (D.C. Cir. 2017).

28 *Id.* at 389.

29 *Id.* at 388.

30 *Id.* at 391. Notably, then-D.C. Circuit Judge Kavanaugh argued in his dissenting opinion in the case that ISPs did not qualify as common carriers and that requiring burdening them with the net neutrality rules infringed upon their First Amendment rights. *Id.* at 418-26 (Kavanaugh, J., dissenting).

Regulation, *continued on page 18*

Regulation, *continued from page 17*

For example, Parler, a social media platform focused on conservative politics, has touted that its editorial decisions are "less-partisan" than Facebook's and more "free-speech" friendly.[31] Digital platforms frequently make value-laden decisions about who or what content to remove, as Facebook's decision to suspend former President Trump indefinitely illustrates. Congress has also signaled the specific intention that platforms should more actively moderate content when it passed Section 230, a federal law that immunizes platforms from torts, such as defamation, based on user-generated content, and that protects platforms' moderation practices.[32]

Consumers have also come to expect different community guidelines and content moderation practices on different platforms. For example, unlike more general social media platforms such as Facebook and Twitter, which strive to appeal to a wide user-base and impose restrictions on posting nudity, OnlyFans, a subscription-based content sharing platform, rose to prominence by allowing nude content.[33] Such decisions reflect platforms' editorial and curational choices in their content offerings. Common carriage burdens on digital platforms would be likely to infringe on companies' own First Amendment rights to exercise such editorial discretion over what content they allow on their platform.

Furthermore, courts have upheld "must carry" and neutrality requirements for private communications companies only when those companies have possessed physical, infrastructural control over access to a certain medium or technology — not, as Justice Thomas suggests in his concurrence, when a private company has a large market share. The context of *Turner Broadcasting v. FCC*, which Justice Thomas cites, is illustrative here. At issue in *Turner* were regulations requiring cable companies to carry local broadcast channels.[34] In the early 1990s it had become clear that cable television would directly compete with broadcasting for market share. Motivated in large part by concerns over cable operators' refusal to carry local broadcast stations, potentially hindering access to free television programming for millions of Americans,[35] Congress enacted the Cable Television Protection Act of 1992, which imposed must-carry obligations on cable operators that required them to distribute local broadcast signals.[36] The Turner Broadcasting Company challenged the provisions as content-based regulations interfering with its right to exercise editorial discretion in choosing which programming to carry.[37]

In determining whether the must carry requirements would be constitutional under the First Amendment,[38] the Court emphasized that "[w]hen an individual subscribes to cable, the *physical* connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home" (emphasis added).[39] The Court stressed that the First Amendment "does not disable the government from taking steps to ensure that private interests not restrict, through *physical control* of a critical pathway of communication, the free flow of information and ideas" (emphasis added).[40]

Additionally, the Supreme Court has found that the presence of market dominance alone is not enough to overcome a private company's First Amendment right to editorial discretion.[41] The Court addressed concerns over market concentration in the newspaper industry in striking down as unconstitutional a Florida statute that required newspapers to publish without cost the reply of any political candidate they had criticized, or face criminal penalties. Chief Justice Burger emphasized that because the newspaper business was highly concentrated, "the power to inform the American people and shape public opinion" was "place[d] in few hands.[42] Burger also noted that the problem of concentration could not be easily fixed by the ordinary processes of market competition given the steep barriers to entry that existed in the newspaper industry.[43] Nevertheless, the Court concluded that concerns over market concentration were not sufficient, and held that the criminal statute unconstitutionally intruded into the function and autonomy of editors. Although the Court had previously upheld similar requirements for the broadcast sector under the Fairness Doctrine, the Court emphasized that in addition to market dominance, broadcast companies were awarded government licenses to utilize spectrum frequencies not [physically] available to all.[44] Unlike the broadcast industry, where physical entry into the market was contingent upon spectrum licenses, theoretically anyone could start a newspaper. [45]

Although concerns over anticompetitive behavior and market dominance of some online platforms may be

31 Rebecca Heilweil, *Parler, the "free speech" social network, explained*, Vox (Jan. 11, 2021) https://www.vox.com/recode/2020/11/24/21579357/parler-app-trump-twitter-facebook-censorship.

32 47 U.S.C. § 230 (2018). *See infra* section 2 for more information regarding Section 230.

33 Matilda Boseley, *'Everyone and their mum is on it': OnlyFans booms in popularity during the pandemic*, Guardian (Dec. 23, 2020), https://www.theguardian.com/technology/2020/dec/23/everyone-and-their-mum-is-on-it-onlyfans-boomed-in-popularity-during-the-pandemic.

34 Turner Broad. Sys., Inc. v. FCC, 114 S. Ct. 2445 (1994) (O'Connor, J., dissenting). Importantly, the Court rejected the argument that the must carry rules were content-based and therefore required strict scrutiny review. Rather, the majority found that the rules were content-neutral even though the rules were clearly speaker-based as they distinguished between cable operators and broadcast stations and even among broadcast stations themselves. The Court's reasoning here was that "the must carry rules, on their face, impose burdens and confer benefits without reference to the content of speech." 114 S. Ct. at 2460. The Court also dismissed the argument that Congress' intent underlying the rules was content-based even as Congress' emphasized concerns over "local news[,] public-affairs programming and other local broadcast services critical to an informed electorate." 114 S. Ct. at 2455. Justice O'Connor's dissenting opinion took issue with this finding and insisted that the must carry rules were based on content as they specifically favored television programming with "a local character." Ironically, Justice Thomas joined this opinion. 114 S. Ct. at 2479. The court applied the intermediate test set forth in United States v. O'Brien, 391 U.S. 367 (1968) (requiring that speech regulation serve important government interest and be narrowly tailored to achieve that interest).

35 Forty percent of Americans lacked a cable connection at the time and had to rely on broadcast for free television programming. The notion that cable television would win in the marketplace over broadcasting and result in over forty percent of Americans losing free television seems unrealistic. How much broadcasting interest-groups account for the passage of the must-carry provisions is an important question beyond the purview of this article. *See e.g.*, Cass Sunstein, *The First Amendment in Cyberspace*, 104 Yale L. J. 1757, 1766 (1994).

36 Section 4 required cable providers to set aside as many as one-third of their channels for commercial broadcast stations. 47 U.S.C. § 534(b)(1)(A)-(B). Section 5 required cable providers carry local "noncommercial educational television stations," in other words, public broadcast channels. 47 U.S.C. § 535.

37 Turner Broad. Sys. Inc. v. FCC, 819 F.Supp. 32 (D.D.C.1993) (granting summary judgment upholding the rules as constitutional).

38 The provisions were later upheld in Turner Broad. Sys. Inc. v. FCC (II), 520 U.S. 180 (1997).

39 Turner Broad. Sys. Inc. v. FCC, 114 S. Ct. 2445, 2470 (1994).

40 *Id.*

41 Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974).

42 *Id.* at 250

43 *Id.* at 251.

44 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

45 *Id.*

warranted,[46] digital platforms do not possess the same physical control over what content appears on the internet as do broadcast licensees. Platforms like Facebook, Reddit, or Twitter, although visible to consumers, exist at the application layer of the internet — the layer used by end-user software services.[47] For example, Reddit does not have control over Twitter, and vice versa. Furthermore — perhaps even more than is the case with the print newspaper industry — theoretically, anyone can start a platform, as the rise of several "niche" platforms illustrates.[48] Therefore, although efforts to crack down on platform "bias" are politically in vogue, it is likely that requiring platforms to host users and content with which they disagree would be constitutionally suspect under the First Amendment.

II. Modifications for Platform Immunity Under Section 230

Passed as part of the Communications Decency Act in 1996, Section 230 provides that platforms are not legally liable for most user-generated content and immunizes platforms from traditional speech torts, such as defamation, as long as the platform did not help create or develop the content.[49] The law does have important exceptions to its immunity provision, however. It does not provide any defense for claims arising under federal criminal law, intellectual property law, certain laws involving prostitution or sex trafficking, or the Electronic Communications Privacy Act.[50] But importantly, Section 230 also provides that platforms are free to moderate content hosted on their platform.[51] This "Good Samaritan" provision grants platforms discretion to take down content and impose proactive measures like providing fact-check flags and moderation filters. Importantly, Section 230 covers a range of online services that publish third-party content, from social media platforms to restaurant review sites and web blogs that have comment sections.[52]

It is important to understand the background and legal context of Section 230 before addressing current proposals to modify the law. Under traditional common-law principles, a person who publishes a false and defamatory statement made by another bears the same liability for the statement as if he or she had originally made the statement. The theory behind "publisher" liability is that a publisher has the knowledge, opportunity, and ability to exercise editorial control over the content of its publications. Publisher liability applies to book and newspaper publishers who can be held liable for content appearing within their pages.

On the other hand, liability for distributors, such as newsstands, bookstores, and libraries, is much more limited. Distributors are generally not held liable for the content they distribute. The theory for repudiating "distributor" liability is that distributors would be forced to read every publication before distributing it. This requirement almost certainly would slow the flow of information to the public. Furthermore, it would be difficult for distributors to know whether content is actionable because they would have to independently determine whether it was false and defamatory. It is likely that if distributors were held liable for all published content, they would probably err on the side of caution and refrain from releasing questionable material to the public. As explained in the *Smith* case below, this could lead to excessive self-censorship.

Section 230 changed these traditional rules for online platforms and was inspired by two libel suits against two different platforms in the 1990s. One platform, CompuServe, provided subscribers with access to specialized "forums" that were run by third parties.[53] Importantly, CompuServe did not review the content of a forum before it was published. When it was sued over a defamatory statement that appeared on its "Rumorville" forum, CompuServe argued that it was a distributor rather than a publisher under traditional libel law.[54] The Southern District of New York agreed and dismissed the claims against CompuServe, stating that the platform had no knowledge of or editorial control over content that was posted to the forum.[55]

Four years later, in *Stratton Oakmont v. Prodigy*,[56] a New York state court came to the opposite conclusion. Prodigy maintained several online bulletin boards and held itself out as a "computer friendly" network[57] as it heavily moderated content published to its boards. An unidentified user of Prodigy's *Money Talk* bulletin board created a post which claimed that securities investment banking firm Stratton Oakmont and its president Danny Porush had committed criminal and fraudulent acts. Stratton Oakmont sued Prodigy as well as the unidentified poster for libel. Because Prodigy enforced community guidelines and exercised editorial control over content, the court ruled that Prodigy was more akin to a publisher than a distributor and could be found liable for false and defamatory content appearing on its online bulletin board.[58]

The split between *CompuServe* and *Prodigy* raised the specter that any effort by a platform to moderate user-generated content would subject it to a higher risk of liability if it failed to eliminate all defamatory material than if it made no effort to moderate user-generated content at all.[59] Chris Cox (R-Calif.) and Ron Wyden (D-Ore.), the authors of Section

46 John D. McKinnon, *These are the U.S. Antitrust Cases Facing Google, Facebook, and Others*, Wall St. J. (Dec. 17, 2020), https://www.wsj.com/articles/these-are-the-u-s-antitrust-cases-facing-google-facebook-and-others-11608150564.

47 Regulating companies further down the "stack" and closer to the infrastructure layer such as cloud services or app stores may raise less First Amendment issues, however. *See e.g.*, Joan Donovan, *Navigating the Tech Stack: When, Where, and How Should We Moderate Content?*, Centre for International Governance Innovation Essay Series (Oct. 28, 2019), https://www.cigionline.org/articles/navigating-tech-stack-when-where-and-how-should-we-moderate-content/.

48 Ilker Koksal, *The Rise of Niche and Vertical Social Networks*, Forbes (Dec. 21 2019), https://www.forbes.com/sites/ilkerkoksal/2019/12/21/the-rise-of-niche-and-vertical-social-networks/?sh=6d18fd873582. A large sum of capital is not necessarily required, although there may be other costs like user-data. *See* Ryan Johnston, *Assessing Monopoly Power or Dominance in Platform Markets: A Summary*, Disruptive Competition Project Blog (Feb. 13, 2020), https://www.project-disco.org/competition/021320-assessing-monopoly-power-or-dominance-in-platform-markets-a-summary.

49 42 U.S.C. § 230(c)(1). *See also* Lemmon v. Snap, Inc., 995 F.3d 1085 (9th Cir. May 4, 2021) (holding that Section 230 does not immunize a platform from a product liability suit if the Internet service is defectively designed).

50 42 U.S.C. § 230(e).

51 *Id.* § 230(c)(2).

52 *Id.* § 230(b).

53 Cubby v. CompuServe, Inc., 776 F.Supp. 135 (S.D.N.Y. 1991).

54 *Id.* at 138.

55 *Id.* at 141.

56 23 Media L. Rep. 1794 (N.Y. Sup. Ct. 1995).

57 In one article highlighted by the Court, PRODIGY stated: "We make no apology for pursuing a value system that reflects the culture of the millions of American families we aspire to serve. Certainly no responsible newspaper does less when it chooses the type of advertising it publishes, the letters it prints, the degree of nudity and unsupported gossip its editors tolerate."

58 *Id.*

59 For background on Section 230 *see*, Jeff Kosseff, The Twenty-Six Words That Created the Internet (2019).

Regulation, *continued on page 20*

Regulation, *continued from page 19*

230, sought to reverse this arguably perverse outcome by introducing legislation that would immunize platforms from liability for user-generated content while providing legal cover to platforms that chose to moderate content. The hope was that platforms would, or at least could, try to remove harmful content provided those efforts did not expose them to legal risk.[60]

Section 230 has become more controversial in recent years, due in part to rulings in favor of unsympathetic platforms.[61] For example, in 2016, the U.S. Court of Appeals for the First Circuit affirmed a District Court of Massachusetts ruling dismissing a lawsuit filed by three victims of child sex trafficking against the online forum Backpage.com.[62] Backpage hosted classified ads, the majority of which featured commercial sex. The First Circuit's unanimous opinion held that despite financially benefiting Backpage, the advertisements were posted by users of the site and therefore Section 230 immunity applied.[63]

However, after a Senate investigation revealed that Backpage employees had helped traffickers create ads, Congress responded in 2018 by amending Section 230.[64] The House bill, the Fight Online Sex Trafficking Act (FOSTA), and the Senate bill, the Stop Enabling Sex Traffickers Act (SESTA), created an exception to Section 230 if a platform or website was found to "promote or facilitate the prostitution of another person."[65] FOSTA/SESTA was signed into law by then-President Trump in April 2018, and its constitutionality has since been challenged in several lawsuits.[66] Free speech advocates have argued that FOSTA/SESTA violates the First Amendment by punishing protected speech and that the words "promote or facilitate" are both overbroad and vague. For example, in *Woodhull Freedom Foundation et al. v. United States*,[67] the Electronic Frontier Foundation has argued on behalf of plaintiffs, Alex Andrews, a director of several sex worker advocacy organizations, and Eric Koszyk, a licensed massage therapist, that FOSTA/SESTA "broadly sweeps up a host of protected speech within its prohibitions, many of which are not defined. Further, the terms in the law are so vague that it's unclear what exactly Congress sought to prohibit, creating uncertainty for many Internet speakers as to whether what they say creates liability under the law."[68] As of this writing, *Woodhull Freedom Foundation et al.* is ongoing.[69]

In 2020, legislators on both sides of the aisle introduced numerous bills to modify or repeal outright Section 230.[70] Several bills focused on limiting the scope of the law by restricting the types of activities protected.[71] For example, under the Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act,[72] sponsored by Sens. Mark Warner (D-Va.), Mazie Hirono (D-Hawaii), and Amy Klobuchar (D-Minn.), companies would not be allowed to use a Section 230 defense for claims stemming from ads or other content they are paid to host. The SAFE TECH Act would also prevent platforms from using Section 230 as a defense in cases arising from civil rights, antitrust, stalking and harassment, human rights, and wrongful death claims.[73]

Other legislative proposals would impose new obligations on companies before they could use Section 230 as a defense. For example, under the Platform Accountability and Consumer Transparency (PACT) Act, sponsored by Brian Schatz (D-Hawaii) and John Thune (R-S.D.), before invoking Section 230 protection, platforms would be required to publish an acceptable use policy that would detail the types of content the platform allows, explain how the platform enforces its content policies, and describe how users can report content that violates the platform's policies or is illegal.[74] The PACT Act would also require platforms to review and remove illegal or content that violates their policy within a specific timeframe.[75] Other bills would impose additional obligations and requirements before a company could use a Section 230 defense, such as reporting suspicious content regarding planning, committing, promoting, and facilitating terrorism and other violent crimes to the Department of Justice,[76] or requiring that platforms moderate content in a "politically neutral" manner.[77] A number of bills also aim to repeal Section 230 in full.[78]

60 *Id*.

61 *See, e.g.*, Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003); Jones v. Dirty World of Entertainment, 755 F.3d 398 (6th Cir. 2014).

62 Doe v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016) (finding that Section 230(e)(1) only excludes federal criminal prosecutions, not civil lawsuits predicated on federal criminal law and that the advertisements were generated by third parties).

63 *Id*.

64 Backpage.com's Knowing Facilitation of Online Sex Trafficking: Hearing before the Permanent Subcomm. on Investigations, 115th Cong. (2017), https://www.govinfo.gov/content/pkg/CHRG-115shrg24930/pdf/CHRG-115shrg24930.pdf.

65 17 U.S.C. § 512 (2018).

66 *See, e.g.*, U.S. v. Martono, 2021 WL 39584 (N.D. Tex. Jan. 5, 2021); Woodhull Freedom Found. v. U.S., 2020 WL 398625 (D.C. Cir. Jan. 24, 2020).

67 Woodhull Freedom Found. v. U.S., 2020 WL 398625 (D.C. Cir. Jan. 24, 2020).

68 Electronic Frontier Foundation, Our Cases Press Release, *Woodhull Freedom Foundation et al. v. United States*, https://www.eff.org/cases/woodhull-freedom-foundation-et-al-v-united-states.

69 *But see*, U.S. v. Martono, 2021 WL 39584 (N.D. Tex. Jan. 5, 2021); (finding that the words "promote" or "facilitate" are sufficiently narrow).

70 For a detailed list of legislative proposals *see*, *All the Ways Congress Wants to Change Section 230*, Slate Future Tense Blog (Mar. 23, 2021) https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html.

71 *See, e.g.*, Eliminating Abusive and Rampant Neglect of Interactive Technologies Act of 2020 (EARN IT) Act, S. 3398, 116th Cong. (2020) (amends Section 230 so that platforms cannot use Section 230 as a defense in state criminal cases and federal and state civil cases regarding the proliferation of child sexual abuse material, in the amended version, a provision was added to note that providers that use end-to-end encryption or are unable to decrypt communications will not face liability purely "because" these cybersecurity protections are built into the platform); Don't Push My Buttons Act, S. 4756, 116th Cong. (2020) (amends Section 230 so that companies cannot use Section 230 as a defense if they collect user data and then use the data in an algorithm that delivers content to the user, unless a user knowingly and intentionally elects to receive such tailored content); Protecting Americans From Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020) (amends Section 230 so that companies cannot use Section 230 as a defense in cases brought for civil rights violations or acts of international terrorism and if the company uses an algorithm that amplifies or recommends content relating directly to the case); Stop Suppressing Speech Act of 2020, S. 4828, 116th Cong. (2020)(limits Section 230 protection to instances when companies moderate content only if it falls within three categories: harassment, illegal content, or violence and terrorism.); Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act. S.___, 117th Cong. (2021).

72 Safeguarding Against Fraud, Exploitation, Threats, Extremism, and Consumer Harms (SAFE TECH) Act. S.___, 117th Cong. (2021).

73 *Id*.

74 Platform Accountability and Consumer Transparency (PACT) Act, S. 4066, 116th Cong. (2020).

75 *Id*.

76 See Something, Say Something Online Act of 2020, S. 4758, 116th Cong. (2020).

77 *See, e.g.*, Ending Support for Internet Censorship Act, S. 1914, 116th Cong. (2020) (In order to receive Section 230 protection a company would have to prove by clear and convincing evidence that it does not, and did not in the preceding two-year period, moderate user content in a politically biased manner).

78 *See e.g.*, S. 5085, 116th Cong. (2020)(this proposal was introduced in

However, as the *Woodhull* case illustrates, modifications to Section 230 may raise First Amendment issues and concerns. For example, revisions that vaguely limit the scope of Section 230 or require strict takedown timeframes may cause risk-averse platforms to exercise caution and suppress otherwise lawful user speech.[79] Laws that encourage this type of behavior may violate the First Amendment, as evidenced by the 1959 Supreme Court ruling in *Smith v. California*. At issue in *Smith* was a city ordinance that imposed strict liability on those in possession of obscene books.[80] Eleazar Smith, a Los Angeles bookstore owner, was convicted under the statute for selling a copy of the pulp novel *Sweeter Than Life*. Smith had never read the book and had no knowledge that the book was considered obscene. The Court highlighted that the statute essentially required booksellers to read every book ever sold — an impossible proposition. The ordinance would also cause booksellers to err on the side of excluding any material that might be found objectionable. In overturning the law, the Court emphasized how laws incentivizing excessive caution by intermediaries "tend to restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly."[81] The Court went on to conclude that "[t]he bookseller's self-censorship, compelled by the State, would be censorship affecting the whole public, hardly less virulent for being privately administered."[82] Therefore, modifying Section 230 to encourage platforms — which deal with massive amounts of content[83] — to suppress otherwise lawful speech may rise to the level of government censorship.

Proposals to use Section 230 protection as leverage to encourage platforms to adopt a broader set of obligations may also create constitutional friction. For example, under the PACT Act, platforms would be required to create quarterly transparency reports outlining their actions in content moderation decisions.[84] Such requirements may be considered unconstitutional compelled speech. In 2019, the U.S. Court of Appeals for the Fourth Circuit struck down a Maryland law that required newspapers and online platforms to publish on their websites and retain for state inspection the identity of those who purchased political ads and how much they had paid.[85] Although the Court noted the strong state interest in transparency, the Court found that the requirement to disclose the identity of the advertiser and the cost of placing the ad constituted compelled speech that infringed on editorial control. Therefore, although calls for modifying Section 230 have become politically popular in the last few years, policymakers should consider how such modifications may conflict with the First Amendment.

III. Limits on How Platforms Recommend and Rank Content

An increasingly popular approach with policymakers is to regulate how platforms and their algorithms recommend and rank users' content. For example, one such proposal would revoke Section 230 immunity in cases where platforms use computational processes (such as algorithms) to recommend user content relating to support for international terrorism or civil rights abuses.[86] Advocates of this approach argue that "free speech does not mean free reach"[87] and that regulations are needed to diminish the spread of harmful or problematic content.

Just as regulations aimed at requiring platforms to host or take down specific content would raise First Amendment issues, so too would regulations aimed at how platforms rank and recommend that content. Under the First Amendment, laws that regulate speech based on its content must meet a high standard of "strict scrutiny," meaning that the law in question must be narrowly tailored to promote a compelling government interest and must be the least restrictive means for achieving that interest.[88] In striking down an FCC rule which required cable operators either to completely scramble or block channels that were primarily dedicated to sexually-oriented programing or limit their transmission to the hours of 10 pm to 6 am, the Supreme Court held that even though the regulation did not completely prohibit specific content (in this case, sexually-oriented content), it nevertheless singled out specific content for regulation. "The distinction between laws burdening and laws banning speech is but a matter of degree," the Court stated before concluding that such "content-based burdens must satisfy the same rigorous scrutiny as its content-based bans."[89] Therefore, it is likely that regulations aimed at limiting how certain information is ranked and recommended on digital platforms will also trigger strict scrutiny and need to be the least restrictive means in promoting a compelling government interest — a high standard to satisfy.

Furthermore, because they are private companies, platforms also have their own First Amendment rights to exercise editorial discretion over what content they carry. Platforms often use automated processes through computerized algorithms to make decisions over what content to recommend to users, and, in the case of search engines, how to rank that content. So far, courts have characterized platforms' algorithmic decisions as "in essence, editorial judgments about which political ideas to promote."[90]

negotiations over COVID-19 relief. It would have increased the stimulus checks for COVID-19 from $600 to $2,000 in exchange for repealing Section 230 in its entirety); Abandoning Online Censorship (AOC) Act, H.R. 8896, 116th Cong. (2020).

79 As Law Professor Daphne Keller explains, "Unclear speech laws applied to (and thus interpreted by) platforms will predictably chill speech differently than those same speech laws applied directly to speakers. A speaker may decide to say things that fall in a legal gray area — whether because she knows her words are justified by the facts, because she is committed to a cause.. . . A platform will almost always lack that knowledge, motivation, or bravery. Erring on the side of suppressing the user's speech is safer." Daphne Keller, *Six Constitutional Hurdles for Platform Speech Regulation*, The Center for Internet and Society Blog (Jan. 22, 2021), http://cyberlaw.stanford.edu/blog/2021/01/six-constitutional-hurdles-platform-speech-regulation.

80 Smith v. Cal., 361 U.S. 147 (1959).

81 *Id.* at 154.

82 *Id.*

83 *See, e.g.*, Ctr. for Democracy & Tech. v. Pappert, 337 F. Supp. 2d 606 (E.D. Pa. 2004); Mike Masnick, *Content Moderation At Scale Is Impossible: Recent Examples of Misunderstanding Context*, TechDirt (Feb. 26, 2021) https://www.techdirt.com/articles/20210225/10365146316/content-moderation-scale-is-impossible-recent-examples-misunderstanding-context.shtml.

84 Platform Accountability and Consumer Transparency (PACT) Act, S. 4066 § 5(a)(2)(D), 116th Cong. (2020).

85 *See, e.g.*, Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

86 Protecting Americans from Dangerous Algorithms Act, H.R. 8636, 116th Cong. (2020).

87 Renee Diresta, *Free Speech is Not the Same As Free Reach*, Wired (Aug. 30, 2018), https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach/.

88 Sable Communications of Cal., Inc. v. FCC, 492 U. S. 115, 126 (1989).

89 United States v. Playboy, 529 U.S. 803, 812 (1999).

90 Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014); *See also* Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629-30 (D. Del. 2007) ("The First Amendment guarantees an individual the right to free speech, 'a term necessarily comprising the decision of both what to say and what not to say.. . .' [T]he injunctive relief sought by Plaintiff contravenes Defendants' First Amendment rights."); Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003) (Google's ranking decisions are "constitutionally protected opinions" that

Regulation, *continued on page 22*

Regulation, *continued from page 21*

The first case to examine a search engine's First Amendment rights was *Search King, Inc. v. Google*.[91] Search King was a search optimization firm that promised to elevate its clients' rankings in a Google search. When Google caught wind of the business, the search engine actively demoted Search King's clients. Search King sued Google for tortious interference with contract.[92] Google raised a First Amendment defense and the court agreed, refusing to grant Search King a preliminary injunction. Google argued that although it uses sophisticated computerized algorithms, those algorithms "inherently incorporate the search engine company engineers' judgments about what material users are likely to find responsive to these queries."[93]

To fortify their stance on the matter, in 2012, Google commissioned a white paper by prominent UCLA law professor Eugene Volokh and class action attorney Donald Falk in which the pair asserted that Google is akin to a modern day newspaper editor.[94] Just as a newspaper editor selects the most important stories of the day and presents them on the front page, Google's engineers code an algorithm with various criteria and direction on how to rank and present the world's web pages and hence, according to Volokh and Falk, are entitled to the same protections.[95] At least two courts have agreed with the newspaper editor analogy, finding that a search engine's engineers have editorial "autonomy to choose the content of [their] own message."[96]

These opinions have prompted a vast amount of scholarship debating whether algorithmic outputs should be considered speech.[97] Many have questioned whether a message is actually communicated through such subtleties as rankings.[98] Furthermore, as technology evolves and platforms incorporate machine learning algorithms — programs that evolve and re-write themselves as a result of being exposed to ever-increasing sets of data — it may be even more questionable whether content recommendations and rankings reflect editorial discretion on behalf of the companies' engineers.[99] However, as this area of law develops, it seems likely that government-imposed limits on platforms' algorithmic processes will conflict with platforms' rights of editorial discretion, just as proposals requiring platforms to publish, keep up, or take down content do.

IV. Conclusion

As this article outlines, proposals intent on regulating platforms' content moderation practices come in many forms: requiring platforms to host content and users; modifying Section 230 immunity; and limiting how platforms recommend and rank content. Examining the debate over online speech and discourse through a First Amendment lens illustrates that we must be careful not to replace platform power with government censorship. Regulations concerning private companies' editorial discretion over what content to host and how to deliver that content bring with them a dangerous potential to restrict the public's access to information — either intentionally or unintentionally through vague and overbroad requirements.

Furthermore, it is unlikely that government intrusion upon private editorial discretion is warranted here. Platforms, operating at the application layer, do not possess physical infrastructural control over access to the internet. New platforms can and do emerge to reflect different viewpoints and consumer choices as the rise of Parler and OnlyFans highlights. Rather, overly burdensome requirements such as detailed transparency reports or short take-down timeframes will be likely to more firmly entrench those platforms with the resources to comply. Such regulations would serve to concentrate platform power — not to dispel it. The most important consideration should not be that platforms be politically neutral or represent all viewpoints, but that the public remain free to choose among alternative sources of information that emerge.

— Sarah Wiley
Silha Research Assistant

are "entitled to full constitutional protection.").
91 Search King, Inc. v. Google Tech., Inc., No. CIV-02-1457-M, 2003 WL 21464568 (W.D. Okla. May 27, 2003).
92 *Id.*
93 *Id.*
94 Eugene Volokh & Donald Falk, *First Amendment Protection for Search Engine Search Results*, 6-7 (2012), *available at* http://www.volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf (arguing that the First Amendment protects Google's search results).
95 *Id.*
96 Zhang v. Baidu.com, Inc., 10 F. Supp. 3d 433, 435 (S.D.N.Y. 2014); *See also* Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629-30 (D. Del. 2007).
97 *See e.g.*, Tim Wu, *Machine Speech*, 161 U. Pa. L. Rev. 1495 (2013); James Grimmelmann, *Speech Engines*, 98 Minn. L. Rev. 868 (2014); Stuart Benjamin, *Algorithms and Speech*, 161 U. Pa. L. Rev. 1445, 1451 (2013).
98 *See generally* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "Freedom of Speech" Encompasses*, 60 Duke L. J. 1673, 1689–91 (2011) (arguing that mere transmission is not speech). *See also supra* note 45.
99 These modern algorithms are no longer fixed in form but are emergent and constantly unfolding and updating in multifarious ways, thus making it difficult for engineers to identify exactly how they come to decisions. Will Knight, *The Dark Secret at the Heart of AI*, MIT Tech. Rev. (Apr. 11, 2017), *available at* https://www.technologyreview.com/2017/04/11/5113/the-dark-secret-at-the-heart-of-ai/.

Congratulations, Scott!

Dr. Scott Memmel received the 2021 Nafziger-White-Salwen Dissertation Award for his dissertation titled "Pressing the Police and Policing the Press: The History and Law of the Relationship Between the News Media and Law Enforcement in the United States," which was written during his time at the Hubbard School of Journalism and Mass Communication (HSJMC) under the direction of his advisor, Professor Jane E. Kirtley, Director of the Silha Center for the Study of Media Ethics and Law.

The Nafziger-White-Salwen Dissertation Award is the highest honor bestowed by the Association for Education in Journalism and Mass Communication (AEJMC) for student scholarship, recognizing the best dissertation in the field of mass communication research.

Dr. Memmel is a Postdoctoral Associate at HSJMC and a former Silha *Bulletin* Editor.

Challenging Government Secrecy: An Analysis of Minnesota Government Data Practices Act Cases in Administrative Court

What happens when public records requesters are denied access to government information? In Minnesota, requesters seeking records under the Minnesota Government Data Practices Act (MGDPA) have several options.[1] Requesters can try to negotiate informally with the agency denying access to the records. Requesters can ask the state's Data Practices Office, a unit of the Minnesota Department of Administration, for non-binding guidance, which the Office has discretion to provide.[2] Or requesters can litigate. Although requesters can file suit in county district courts,[3] they can also seek expedited review of an agency's response by filing a complaint with the state's Office of Administrative Hearings (OAH), a state administrative court.[4]

This article examines how OAH handles public records complaints and analyzes the office's recent caseload. The research finds 16 MGDPA cases between 2012 and early 2020 in which requesters sought intervention from OAH to compel access to public records. Eight of the complaints were dismissed, three cases resulted in an order to disclose, another three cases were withdrawn, and at least two cases were settled. Slightly more than half of the complainants were represented by legal counsel; two of the complainants were lawyers themselves.

The article also examines these cases in the broader context of administrative review mechanisms, which are processes to resolve disclosure disputes outside the path of normal litigation. In so doing, the article analyzes how OAH works and how effective it is at resolving disputes that arise under the MGDPA. The analysis makes several notable findings: (1) OAH is a potentially powerful mechanism for requesters to obtain third-party review of disclosure disputes in a way that is faster and less expensive than suing in district court; (2) OAH has been used by a wide range of complainants across Minnesota; but (3) relatively few requesters use OAH to resolve disclosure disputes. This article suggests that reducing the appeal filing fee may enable more people to use OAH to resolve disclosure disputes.

The Minnesota Government Data Practices Act

The Minnesota Legislature added the OAH review provision to the MGDPA in 2010.[5] The law created an expedited process to adjudicate complaints that government agencies were violating the MGDPA, and gave OAH binding authority to compel compliance.

The statute lays out the basic procedure for how the system is supposed to work. An aggrieved record requester must first file a complaint with OAH and pay a $1,000 filing fee, although the fee is largely refunded if the complaint is upheld.[6] The complaint generally must be filed within two years after the government agency's action or inaction that is the subject of the complaint.[7] OAH must then give notice of the complaint to several specified people and offices. First, OAH must notify the official or government authority that is the subject of the complaint, typically referred to as the respondent.[8] The respondent generally has up to 15 business days after receiving notice of the complaint to submit a response.[9] Second, OAH must notify, "to the extent practicable," any persons or entities that are the subjects of any of the records.[10] Third, OAH must give notice to the Minnesota Commissioner of Administration that a complaint has been filed seeking access to records under the MGDPA.[11] State law requires OAH to dismiss the complaint and refund the filing fee if the Commissioner had accepted a request for an opinion on the same matter before the complaint was filed with OAH. If the Commissioner decides not to issue an opinion on the substance of the matter, that determination must be provided to the requester within five business days of receipt of the request. Otherwise, the Commissioner is required to issue an opinion within 20 business days of receiving the request, although the Commissioner may extend the deadline by up to 30 additional days.

Assuming the complaint is not the subject of a pending opinion request with the Commissioner of Administration, the complaint can then proceed at OAH, where an administrative law judge is required to issue a preliminary determination about the disposition of the complaint within 20 business days after the respondent files a response or after the respondent's time to file a response has expired.[12] The preliminary determination is binary and must be one of two possibilities. Relying on information from the complaint and the agency's response, the judge can find either that there is probable cause to believe that the MGDPA was violated, at which point the judge must schedule a hearing, or the judge must find that the facts do not establish probable cause that the MGDPA was violated, which would prompt dismissal of the complaint.[13] If dismissal occurs, the complainant is entitled to ask the Chief Administrative Law Judge to reconsider the dismissal on the grounds that there was a clear material error.[14]

When a judge finds probable cause to believe that the MGDPA was violated, OAH must notify all parties and inform them that they can "submit evidence, affidavits, documentation, and argument for consideration";[15] a hearing must be scheduled within 30 business days after the parties are notified of the probable cause determination, although the parties may waive the hearing when its purpose is to resolve questions of law.[16] The judge is then required to issue a decision within 10 business days of closing the hearing record. The judge is required to make a determination about whether the alleged violation occurred and take at least one of five actions: (1) dismiss the complaint; (2) find that the respondent violated the MGDPA;

1 Minn. Stat. § 13.01 *et seq.*.
2 *Id.* § 13.072.
3 *Id.* § 13.08.
4 *Id.* § 13.085.
5 Chapter 297—H.F.No. 2899, Minnesota Session Laws, Regular Session, Office of the Revisor of Statutes (2010).
6 Minn. Stat. § 13.085, subd. 6(c).
7 *Id.* § 13.085, subd. 2(b).
8 *Id.* § 13.085, subd. 2(d).
9 *Id.* § 13.085, subd. 2(f).
10 *Id.* § 13.085, subd. 2(d).
11 *Id.* § 13.085, subd. 2(e).
12 *Id.* § 13.085, subd. 3(a).
13 *Id.* § 13.085, subd. 3(a)(1)-(2).
14 *Id.* § 13.085, subd. 3(c).
15 *Id.* § 13.085, subd. 3(b)(1).
16 *Id.* § 13.085, subd. 4(a).

MGDPA, *continued on page 24*

MGDPA, *continued from page 23*

(3) fine the respondent up to $300; (4) order the respondent to comply with the MGDPA; and/or (5) refer the complaint for prosecution for potential criminal charges.[17] Parties are entitled to judicial review of OAH decisions to the state Court of Appeals and potentially to the state Supreme Court, if the justices accept review at that level.[18] Parties are also entitled to bring a subsequent action that alleges the same violations in district court, although OAH decisions are not binding on the district court.[19]

Complainants who prevail on the merits in substantial part are entitled to a "rebuttable presumption" that reasonable attorney's fees will be paid up to $5,000, except in cases when the violation is purely technical or when the law's meaning is reasonably ambiguous.[20] The law provides that attorney's fees must be awarded up to $5,000 if the respondent authority had been the subject of a written opinion by the Minnesota Commissioner of Administration that was directly about the dispute and the authority "did not act in conformity with the opinion."[21] If the judge finds that the complaint was frivolous or used to harass, the judge must order the complainant to pay the respondent's attorney's fees up to $5,000.[22]

Administrative review mechanisms like the OAH complaint procedure are processes aimed, at least in part, at resolving public records disputes outside of typical litigation. Four types of administrative review mechanisms exist in the United States. First, mediation-oriented mechanisms seek to resolve disclosure disputes through voluntary cooperation among the parties, usually facilitated by a neutral third party, such as a mediator or ombudsperson.[23] Second, adjudication-oriented mechanisms seek to resolve disclosure disputes using formal, quasi-judicial processes. Whereas mediation-oriented mechanisms aim for mutual satisfaction between the disputing parties, adjudication-oriented mechanisms are more focused on identifying who is right.[24] Third, advisory-oriented mechanisms typically involve a third party who reviews a dispute and issues a non-binding, advisory opinion. Fourth, litigation surrogate mechanisms authorize a third party, such as a state attorney general, to sue a government agency in court on behalf of a record requester.

OAH fits the closest to adjudication-oriented mechanisms. OAH uses a formal, adversarial, and quasi-judicial process to resolve public records disputes, but does so in a manner that may be faster and less expensive than litigation in a state district court.

Analysis of Minnesota Government Data Practices Act Complaints

This section summarizes the nature and disposition of MGDPA complaints filed with OAH between 2012 and early 2020 in which requesters were seeking access to records. Complaints were identified by filing a MGDPA request with OAH in 2020 for copies of the complaints and related case filings. In response to the request, OAH produced copies of 16 complaints and related case documentation in which the complainant sought access to records and which resulted in some sort of action by an administrative law judge. Some complaints that OAH produced were excluded from analysis either because they were not about access or the requester did not submit the required filing fee.

Cases in this analysis are categorized by complainant type. Four complaints involved requests from the news media, three were filed by businesses or individuals engaged in commercial activity, eight were filed by individuals in their personal capacity, and one complaint was brought by a fraternity.

Journalistic Complainants:
KSTP-TV v. Metro Transit and the Metropolitan Council (2013)

In *KSTP-TV v. Metro Transit and the Metropolitan Council*, complainant KSTP-TV requested video from two separate, unrelated bus incidents in 2013.[25] Metro Transit opened investigations into both cases to determine whether its drivers were at fault. As part of the investigations, Metro Transit reviewed camera footage from the buses. Neither driver was ultimately disciplined. A KSTP-TV reporter requested the camera footage from these investigations, but Metro Transit asserted that the videos constituted personnel information and therefore were private, not public, data. The television station, represented by counsel, later filed an expedited data practices complaint with OAH.

Administrative Law Judge Eric L. Lipman held a hearing to determine whether probable cause existed as to whether Metro Transit violated the MGDPA. Metro Transit argued that the videos were private personnel information, and that the segments of the video that were public could not be separated from the private portions. This consistently had been Metro Transit's position concerning videos reviewed for employee investigations. Lipman noted that in a similar but unrelated records dispute, a district court had recently ordered the Metropolitan Council to turn over security footage from a bus incident,[26] and he cited this case in disagreeing with Metro Transit's analysis.

Lipman observed that under MGDPA, data created or collected for the purpose of investigating employee misconduct is private personnel data until there is disciplinary action against the employee. However, he found that the exemption did not apply in this case because the video footage was not created for the purpose of investigating the drivers. Lipman further found that there was no risk of biased or fabricated information, as in previous cases, so employees who were recorded by the security cameras in this case would not be harmed by false rumors or statements. The cameras were also in public spaces freely accessible to everyone. Several previous advisory opinions from the Commissioner of Administration held that cameras in public spaces did not become nonpublic simply because an employee was present. Finally, because Metro Transit had admitted that any video footage it had not reviewed was public, Lipman wrote that it was nonsensical to believe such footage became private simply because an official reviewed it as part of an investigation.

Lipman concluded that there was probable cause that a violation of the MGDPA had occurred. He further noted that

17 *Id.* § 13.085, subd. 5(a).
18 *Id.* § 13.085, subd. 5(d).
19 *Id.* § 13.085, subd. 5(e).
20 *Id.* § 13.085, subd. 6(a).
21 *Id.* § 13.085, subd. 6(b).
22 *Id.* § 13.085, subd. 6(e).
23 William L. Ury, Jeanne M. Brett, & Stephen B. Goldberg, Getting Disputes Resolved (1988).
24 Daxton R. Stewart, Constructively Managing Conflict About Open Government: Use of Ombuds and Other Dispute Resolution Systems in State and Federal Sunshine Laws (2009) (Ph.D. dissertation, University of Missouri), at 23-24.
25 In re KSTP-TV v. Metro Transit and the Metropolitan Council, No. 8-0305-31782 (Minn. Office Admin. Hearings).
26 Memorandum and Order, Burks v. Metropolitan Council, 27-CV-14-3175 (Dist. Ct. Minn. Sept. 17, 2014) (unpublished).

because there were no facts in dispute, an evidentiary hearing would be unnecessary. Although the parties had a right to proceed to a hearing, they agreed that interpretation of the law was the only issue. Lipman later entered an order compelling Metro Transit to produce the videos.

The Minnesota Court of Appeals affirmed Lipman's order,[27] but the Minnesota Supreme Court reversed and remanded the case back to OAH for further proceedings to assess "whether the recording . . . was 'maintained' by Metro Transit exclusively for a personnel purpose at the time KSTP made its request to access the data."[28] Metro Transit later provided the requested video to KSTP, and Lipman subsequently dismissed the case.

Gilbert v. Minnesota Dep't of Human Services (2019)

In *Gilbert v. Minnesota Dep't of Human Services*, Curtis Gilbert of American Public Media requested a county breakdown of minors sent out of state by the Minnesota Department of Human Services (DHS) for residential treatment.[29] Gilbert requested summary data collected by DHS under the Interstate Compact of Placement of Children, including the dates of placement, the receiving agency, the facility of placement, and the county that made the placement.

Gilbert received a partial response to his request. DHS sent him a spreadsheet containing all the requested data except for the number of placements from each county. Gilbert then requested the missing data. DHS responded that it would not provide that information, which was categorized as private under Minn. Stat. § 13.46 because it could be used to identify a juvenile. When Gilbert asked how such information could identify a juvenile, he was informed that some counties had populations so small that disclosing the numbers could inadvertently identify the minors.

Gilbert responded that because every county in Minnesota had at least 500 minors, he would be unable to identify the ones placed out of state. He noted that OAH had previously held that demographic data was not "identifying" provided that the group to which the data applied had at least ten members. Because he sought data for a much larger set of people, the data should be provided to him. He further noted that prior decisions holding that there was a reasonable likelihood of identification relied on combining the requested data with other public data. In this case, Gilbert argued, there was no other public data available that could lead to identification. The parties eventually settled and the complaint was dismissed. Gilbert pursued the complaint without an attorney.

Webster v. Hennepin Cnty. and Hennepin Cnty. Sheriff's Office (2016)

In *Webster v. Hennepin Cnty. and Hennepin Cnty. Sheriff's Office*, independent journalist Tony Webster requested records about biometric data, including emails, from the Hennepin County Sheriff's Office (HCSO).[30] He followed up several times to check on the status of his request over the course of three months. Webster received six email responses to his inquiries, all stating that his request was still being processed, but HCSO refused to share details about what the office was doing to comply with the request or whether there were any problems producing the requested records.

HCSO later provided Webster with records responsive to his request except for the emails. He was informed that searching for the 10 keyword terms he sought was too burdensome, as the office had run a test search that took seven hours and produced 312 emails. Webster, represented by counsel, then filed a complaint with OAH.

At an evidentiary hearing, it was revealed that the initial email search had not been done in the fastest way or limited by date. It was also revealed that two additional email searches had been performed, but the results had not been provided to Webster. HCSO estimated that doing a multi-inbox search for the request would take 18 hours.

Administrative Law Judge Jim Mortenson found several violations of the MGDPA. He found first that HCSO did not respond to Webster's request in a timely fashion. Further, it had failed to maintain its email communications in a manner that made searching and accessing public data "easily accessible for convenient use." He also found that Webster had not been permitted to inspect all documents responsive to his request and was not informed of the legal basis for withholding any data.

Mortenson ordered HCSO to provide Webster with the opportunity to inspect all responsive data. He further ordered HCSO to perform the email search and preserve the metadata. However, given the volume of emails, they could be provided on a rolling weekly basis to Webster. Mortenson imposed a civil fine of $300 and ordered HCSO to better organize its public data so that it would be easily accessible to the public. The dispute was later appealed to the Minnesota Court of Appeals[31] and the Minnesota Supreme Court.[32] The Supreme Court found that HCSO failed to allow Webster to inspect and copy the requested data, failed to establish procedures ensuring that MGDPA requests are "received and complied with in an appropriate and prompt manner," and failed to inform Webster in a timely manner of the legal citation supporting the office's determination to deny access. However, the Supreme Court reversed the finding that HCSO had failed to maintain government data so they are "easily accessible for convenient use."

The case then returned to OAH, and Mortenson ordered HCSO to provide Webster an opportunity to inspect data he had requested, but had not been given access to, including emails with metadata. Mortenson also ordered HCSO to pay the $300 civil penalty, as well as $1,000 in hearing costs to OAH.

Helmberger v. Johnson Controls (2012)

Marshall Helmberger, the publisher and managing editor of *The Timberjay* newspaper in northern Minnesota, filed a MGDPA request for a copy of a subcontract between Johnson Controls and one of its subcontractors, Architectural Resources, Inc. (ARI).[33] The subcontract was for a project Johnson Controls was managing for a local public school district. The school district responded to Helmberger's request by stating that although it had a copy of its contract with Johnson Controls, the district did not have a copy of the subcontract between Johnson Controls and ARI. Helmberger then requested the subcontract directly from Johnson

27 KSTP v. Metro Transit, 868 N.W.2d 920 (Minn. Ct. App. 2015).
28 KSTP v. Metropolitan Council, 884 N.W.2d 342, 350 (Minn. 2016).
29 In re Curtis Gilbert v. Minnesota Dep't of Human Services, No. 80-0305-364012 (Minn. Office Admin. Hearings).
30 In re Tony Webster v. Hennepin Cnty. and Hennepin Cnty. Sheriff's Office, No. 5-0305-33135 (Minn. Office Admin. Hearings).
31 Webster v. Hennepin Cty., No. A16-0736, 2017 WL 1316109 (Minn. Ct. App. Apr. 10, 2017).
32 Webster v. Hennepin Cty., 910 N.W.2d 420 (Minn. 2018).
33 In re Marshall Helmberger v. Johnson Controls, Inc., No. 8-0305-22159-DP (Minn. Office Admin. Hearings).

MGDPA, *continued on page 26*

MGDPA, *continued from page 25*

Controls, which refused to produce the records. Helmberger subsequently filed a complaint with OAH and had the assistance of counsel at some, but not all, times during the proceedings.

OAH dismissed the complaint, finding that Helmberger did not present sufficient facts to establish probable cause that the MGDPA was violated. Helmberger sought reconsideration of the dismissal, arguing that Johnson Controls was performing a governmental function. The Chief Administrative Law Judge granted the reconsideration petition.

According to OAH, the central legal question presented in the case was whether Johnson Controls was performing a governmental function under its contract with the school district. If so, the company would be subject to the MGDPA under the privatization provision of Minn. Stat. § 13.05, subd. 11(a). That statute states, in relevant part: "If a government entity enters into a contract with a private person to perform any of its functions, all of the data created, collected, received, stored, used, maintained, or disseminated by the private person in performing those functions is subject to the requirements of this chapter and the private person must comply with those requirements as if it were a government entity."

After an evidentiary hearing, Administrative Law Judge Eric L. Lipman dismissed the complaint, concluding that Helmberger did not show that architectural services "are traditionally performed by school districts in Minnesota." Lipman also concluded that Helmberger failed to show that such services are a governmental function of the school district under Minn. Stat. § 13.05, subd. 11(a), or that the contract between the district and Johnson Controls required the company to publicly disclose copies of subcontracts. "[N]ot every disbursement of public money includes, or implies, a transfer of powers and duties conferred by statute to a private contractor," Lipman wrote.

In interpreting Minn. Stat. § 13.05, subd. 11(a), Lipman reached a different conclusion than the state Commissioner of Administration, who had opined in an earlier advisory opinion that a contractor responsible for the construction and renovation of a public school was performing a governmental function. Lipman wrote that there was reason to depart from the non-binding advisory opinion because it did not reference legislative history that suggested the privatization provision of the MGDPA should be read and applied broadly. "Because the requested subcontractor data is not held by the School District, and the District has not transferred government functions to Johnson Controls, Mr. Helmberger is not entitled to relief under the Data Practices Act," Lipman wrote. Helmberger appealed, and the Minnesota Court of Appeals reversed OAH, finding that Johnson Controls was contracted to perform a government function.[34] However, the Minnesota Supreme Court reversed the Court of Appeals, concluding that Johnson Controls was not required to perform a governmental function under its contract with the school district, and that even if it was, MGDPA does not require that data maintained by a government contractor is subject to disclosure.[35]

Commercial Complainants:

Halva v. Minnesota State Colleges and Universities (2017)

This case stemmed from a request for proposals (RFP) that Minnesota State Colleges and Universities (Minnesota State) issued for an online course registration system.[36] Tyler Halva, a computer engineer, submitted a response to this RFP. A university selection committee later evaluated the proposals during a remote video meeting and used Adobe Acrobat to highlight the proposals electronically, but the highlights were not saved. In December 2015, after Halva learned that his proposal was not selected, he filed a data request for the names of the bidders. Six weeks later, Halva received the names of three other bidders who were not awarded the contract. In February 2016, Halva sought the proposal documents and evaluation materials of all bidders and went on to file additional data requests for records from Minnesota State related to the RFP. Minnesota State did not acknowledge that it had received Halva's requests until August 2016. Minnesota State later sent Halva a flash drive with the requested data of the three other bidders. However, Halva did not receive a copy of the RFP materials he had submitted or evaluative records related to his submission.

On his own behalf and without counsel,[37] Halva filed an expedited MGDPA complaint asking to be provided with his proposal and any evaluation materials related to it. He also alleged that Minnesota State's responses to him were not timely. Minnesota State countered that it did not think it had to provide Halva with a copy of his own proposal, and that his proposal was rejected for being incomplete.

Administrative Law Judge Laurasue Schlatter found that Minnesota State violated the MGDPA, concluding that there was no reason for the university to have taken so long to reply to Halva's requests, and that the university should at least have acknowledged receipt of the requests earlier. She also found no support that the university was not required to provide Halva with his own proposal. In fact, Halva specifically asked for all proposals, which would have included his. Minnesota State also sent no evaluation materials related to his proposal and did not tell him why.

As a result, Schlatter ordered Minnesota State to provide Halva with a copy of his proposal and to determine whether the university had retained a copy of the evaluation materials for it, namely the highlighted portions. Minnesota State later acknowledged that it did not retain the highlights. Halva then argued that Minnesota State was obligated to use software that would preserve highlighting and that the video meeting should have been recorded. However, Halva made those arguments citing the state's Official Records Act,[38] which governs record retention, and not the MGDPA. Minnesota State argued, and Schlatter agreed, that Halva's claims under the Official Records Act were outside the jurisdiction of OAH. Although OAH is statutorily authorized to adjudicate MGDPA complaints, it is not authorized to adjudicate complaints arising under the Official Records Act. Schlatter wrote that under the MGDPA, the university was not required to "provide data that was not recorded in physical form outside the minds of the staff who discussed his proposal." Moreover, Schlatter wrote that the university does not have a duty to "acquire a particular kind of software in order to create a permanent record of an electronic conversation or meeting."

34 Marshall Helmberger v. Johnson Controls, Inc., 821 N.W.2d 831 (Minn. Ct. App. 2012).

35 Marshall Helmberger v. Johnson Controls, Inc., 839 N.W.2d 527 (Minn. 2013).

36 In re Tyler Halva v. Minnesota State Colleges and Universities, No. 80-0305-33827 (Minn. Office Admin. Hearings).

37 Halva was not formally represented in the proceedings, but he disclosed that he had sought legal advice from a law firm prior to filing the complaint.

38 Minn. Stat. § 15.17, subd. 1.

Halva subsequently filed a lawsuit in district court.[39] As part of the suit, he sought to compel Minnesota State to comply with the MGDA and the Official Records Act. He also sought damages for Schlatter's finding that Minnesota State violated Minn. Stat. § 13.03 when it failed to respond "in a reasonable, prompt, and appropriate manner." The district court "concluded that because Halva commenced his MGDPA action in the OAH, he could not relitigate the MGDPA matters in district court." The Court of Appeals reversed, however, writing that Halva "could file a complaint in the OAH seeking to compel [Minnesota State's] compliance with the MGDPA and then file a complaint in district court seeking damages based on the same alleged violation."[40]

The Court of Appeals observed that under Minn. Stat. § 13.08, subd. 4, "an action to compel compliance with the MGDPA may either be brought in district court or filed in the OAH." Further, under Minn. Stat. § 13.085, subd. 5(e), an OAH decision "is not controlling in any subsequent action brought in district court alleging the same violation and seeking damages." However, the Court of Appeals also found that there is no private cause of action under the Official Records Act to pursue claims that it has been violated. Halva appealed the latter issue about the Official Records Act to the Minnesota Supreme Court, which accepted review.[41] The Supreme Court agreed that the Official Records Act provides no private cause of action.

Walmart v. Anoka Cnty. (2019)

Legal counsel for Walmart requested data related to a continuing legal education course (CLE) run by the Minnesota County Attorneys Association (MCAA) entitled "Litigation of a Big Box Property Tax Appeal."[42] The CLE was in the form of a password-protected webinar. At the time, several counties in Minnesota were engaged in property tax disputes with Walmart. The request specifically sought a video recording of the webinar, communications discussing presentations about tax appeals for big box properties, and presentations by two Assistant Anoka County Attorneys. Anoka County denied Walmart's request, asserting that the materials were not public data and constituted privileged attorney work-product.

Walmart disagreed and its attorneys filed a complaint with OAH. The company argued that the records were not protected by the attorney work-product privilege because a legal doctrine required to apply the privilege, the common interest doctrine, had not been formally recognized by Minnesota appellate courts. The common interest doctrine, when recognized, allows different parties to share sensitive information prepared by or for attorneys under representation when those parties share a common interest (i.e., ensuring big box stores pay taxes) and the parties are not adverse. Walmart further asserted that disclosure of the webinar would enable public understanding of how prosecutors make decisions.

Administrative Law Judge Eric L. Lipman issued a *subpoena duces tecum* to MCAA for the names of all people who accessed the webinar. He was able to confirm that the attendees were limited to current county attorneys and staff.

Lipman observed that attorney work-product privilege applies to mental impressions, trial strategy, and legal theories when preparing for litigation. Here, the CLE was about strategies in tax appeals. Anoka County argued that the privilege was not waived because the webinar was provided only to other county attorneys who had a similar interest in prevailing in tax appeals. Password-protecting the webinar showed that they took steps to prevent access by anyone who did not have a common interest. Lipman agreed with this argument.

Although Lipman found that Walmart was correct that Minnesota had never explicitly adopted the common interest doctrine, many Minnesota cases had relied on the Restatement (Third) of the Law Governing Lawyers,[43] which applied the work-product privilege between attorneys with different employers. The Restatement extends the common interest doctrine to non-attorneys who share a "common interest " with an attorney. Therefore, Walmart's argument did not stand, Lipman concluded.

Finally, Lipman found that disclosure of the seminar would not provide a window into public decision-making. Lipman distinguished the case from a district court decision cited by Walmart in which the court found that guidelines for how to resolve minor traffic offenses were not privileged from disclosure. In that case, those guidelines were shared widely across multiple branches of government, given to adversaries in litigation, and were classified public data by statute. Here, Lipman wrote that the CLE was not shared with adversaries or indeed anyone outside of the MCAA. Therefore, Lipman concluded, there was no statutory duty to produce the CLE.

Hurlbert v. Mahnomen County (2014)

Roger W. Hurlbert, president of Sage Information Services, requested the real property assessment records for all properties in Mahnomen County, Minn.[44] He specifically requested the records be provided as a database or in an electronic format "capable of being sorted and manipulated." Hurlbert was referred to the county auditor's office, but he did not receive a response. On his own behalf and without legal counsel, Hurlbert then filed an expedited MGDPA complaint with OAH, alleging that he never received a response to his request and that the Mahnomen County Assessor's Office refused to provide him with the name of the agency's responsible authority who handles public records requests, as required by the MGDPA. Hurlbert later withdrew his complaint and the case was dismissed. The order of dismissal did not specify why Hurlbert withdrew the complaint.

Individual Complainants:

Beedle v. Minneapolis Public Schools (2013)

John Beedle, through his counsel, Michael Cain, filed a MGDPA request with Minneapolis Public Schools (MPS) seeking semi-annual reports of the School Attendance Review Board (SARB) from 2008 through 2011.[45] Cain sent the request through emails addressed to Scott Weber, counsel for MPS, and a specified data request email address. However, Cain

39 Tyler Halva vs Minnesota State Colleges & Universities, 62-CV-18-3910 (Dist. Ct. Minn. June 6, 2018).
40 Halva v. Minnesota State Colleges & Universities, 937 N.W.2d 471 (Minn. Ct. App. 2019).
41 Halva v. Minnesota State Colleges & Universities, 953 N.W.2d 496 (Minn. 2021).
42 In re Walmart Inc. v. Anoka Cnty., No. 8-0305-36242 (Minn. Office Admin. Hearings).
43 The Restatement (Third) of the Law Governing Lawyers § 91(4).
44 In re Roger Hurlbert d/b/a Sage Information Services, No. 60-0305-31500 (Minn. Office Admin. Hearings).
45 In re John Beedle v. Minneapolis Public Schools, No. 16-0305-30450 (Minn. Office Admin. Hearings).

MGDPA, *continued on page 28*

MGDPA, *continued from page 27*

misspelled the data request email address. Weber replied that the requested documents did not exist and provided Cain with the correct email address. Cain again sent a records request to the same email addresses, including one of the erroneous email addresses, for the SARB reports and additional documents, stating they fell under Minn. Stat. § 13.03.

After receiving no response to the second request and a follow-up inquiry, Beedle filed a complaint with OAH alleging that MPS violated the MGDPA by not providing the requested documents and that the documents did exist and were under the control of MPS.

Upon receiving the complaint, MPS conducted a thorough search of its records and located four responsive documents. MPS forwarded the documents to Beedle and informed him that the other documents either did not exist or were not in the control of MPS. MPS further stated that because the requests were not sent to the correct email address, they were not recognized as data requests.

Administrative Law Judge Manuel J. Cervantes reviewed Beedle's complaint and MPS' response and ruled that there was no probable cause to find a violation of the MGDPA. Cervantes found that MPS had provided all relevant documents under its control and provided such records in a timely manner.

Beedle then petitioned OAH for a rehearing. Chief Administrative Law Judge Raymond R. Krause denied the petition, finding that the record showed that Beedle could not sustain the complaint on the facts submitted to OAH and that Cervantes did not commit a clear material error. The data requests had been incorrectly submitted, and once MPS received notice of the complaint, it promptly and thoroughly responded to the request. Furthermore, although Beedle alleged that MPS did not provide him with all documents he requested, he failed to provide sufficient facts to show that the documents in fact existed, or if they did, that they were currently under the control of MPS. As a result, Krause denied the petition for reconsideration.

Gibson v. Kandiyohi Cnty. Attorney (2013)

Shane Gibson cut down trees and bushes on his property in Spicer, Minn. and areas adjacent to his property within a right-of-way held by the Lake Andrew Township.[46] As a result, Gibson was charged with a felony count of criminal damage to property. The county later dismissed the charges against him because there was a dispute as to ownership of the easement.

Gibson subsequently requested information related to the prosecution, including communications between the prosecutor's office and various other parties. The Kandiyohi County Attorney's Office responded that all responsive documents had been provided during the discovery process for the dismissed case, and the remaining documents were governed by attorney work-product privilege.

After counsel for Gibson filed a complaint with OAH, Administrative Law Judge Eric L. Lipman determined that he would need to do an *in camera* review of the disputed materials to assess whether the County Attorney had invoked the work-product privilege properly. The privilege applies to documents and other materials "prepared in anticipation of litigation." After reviewing the disputed items, Lipman determined that they were all materials prepared in preparation for trial and were privileged. The records included "trial preparation documents that contain the fruits of the attorney's investigative endeavors," "relevant evidence prepared by the attorney," and "mental impressions, opinions and legal theories" that government attorneys had prepared. Lipman subsequently dismissed the complaint.

Tallman v. City of Rockville (2015)

Complainant Richard Tallman believed that the city of Rockville, Minn. was overcharging its residents for water and sewer services.[47] Over the course of several years, the relationship between Tallman and Rockville became strained because of his numerous complex data requests.

Tallman requested a spreadsheet of the sales tax charged for water services in the second quarter of 2011, which the city provided. After reviewing the data, Tallman had questions as to how the sales tax amount was calculated. The city did not consider his question a data request because it sought the mental impression of employees, and the city declined to answer his question.

On his own behalf and without legal counsel, Tallman filed an expedited complaint with OAH, arguing that Rockville was attempting to chill his access to public records. He contended that the city had not answered his sales tax question, had billed him excessively for records, and had a form with incorrect rates on it for processing MGDPA requests. Tallman also alleged that the city did not comply with a provision of the MGDPA requiring authorities to make available their written data access policies. Minn. Stat. § 13.025, subd. 4 requires a responsible authority to make copies of policies about data access and requesters' rights to data "available to the public by distributing free copies to the public or by posting the policies in a conspicuous place within the government entity that is easily accessible to the public or by posting it on the government entity's website."

The city moved to dismiss the complaint, which Lipman granted. Although Minn. Stat. § 13.03, subd. 3 (a) requires a responsible authority and designee to inform a requester of the data's meaning, Lipman found that Tallman already was aware of the data's meaning — that it was the amount of sales tax charged — so the city was not required answer his question.

Lipman agreed with the city that because the fees were waived, the overcharging contention was moot. He also found that, beyond Tallman's bare assertion, there was no evidence that the City of Rockville did not keep a written policy for handling data requests.

Tallman moved for rehearing on the issues of billing and alleged failure to make a "'written data access policy' available to the public." He stated that he did not believe the case was moot because he was "'grossly aggrieved' by the city's conduct."

Chief Administrative Law Judge Tammy L. Pust denied the rehearing petition. She noted that Lipman, the administrative law judge who initially presided over the complaint, was correct that the issue of billing was moot. Because the fees had been waived and the city's MGDPA policy changed, there was no controversy for him to decide. She further held that Tallman was incorrect when he said Lipman had determined the failure to provide written policy was moot. In fact, he had said there was no evidence to support Tallman's claim. Pust thus found no clear material error and denied the petition.

Harper v. Minnesota Dep't of Human Rights (2016)

Nicolas Harper requested documents from the Minnesota

46 In re Shane Gibson v. Kandiyohi Cnty. Attorney, No. 8-0305-30695 (Minn. Office Admin. Hearings).

47 In re Richard D. Tallman v. City of Rockville, No. 8-0305-31990 (Minn. Office Admin. Hearings).

Department of Human Rights (MDHR) related to Black Lives Matter protests in the Minneapolis Police Department's Fourth Precinct in 2015.[48] The request sought a wide range of data, including emails, other written communications, or other documents that referenced certain topics, keywords, or were sent to or received from certain individuals. MDHR informed Harper that because of the breadth of his request, the agency could not provide a timeframe for when any responsive documents would be ready for release. Harper then agreed to narrow his request.

Forty-nine days after MDHR confirmed receipt of the request, Harper followed up on the status and offered to further narrow his request. MDHR told him that was not necessary and that the documents were ready for internal, pre-release review. Approximately a month later, Harper followed up again and sent a letter demanding a prompt response to his request. He was advised that the documents would be ready within two weeks.

When Harper followed up again after two more weeks, he was advised that the documents were still not ready. Harper then requested MDHR provide him with the name of the designated responsible authority who would determine what records could be released, and a copy of the department data request policy. The agency never provided Harper with the name of the responsible authority and instead of its internal data request policy, sent him a one-page price sheet for processing requests. Harper, who is a licensed attorney, subsequently filed an expedited complaint with OAH on his own behalf.

The complaint alleged that MDHR did not respond to his request in a timely fashion, refused to provide the requested data in original electronic format, did not inform him of the responsible authority, and either did not have or failed to update its written data access policy. MDHR moved to dismiss the complaint.

Harper later withdrew the portion of the complaint regarding production of the requested data in electronic format, which Administrative Law Judge Ann C. O'Reilly dismissed. But O'Reilly did find probable cause to believe that MDHR violated the MGDPA as to Harper's other claims. O'Reilly found that 133 days to respond to Harper's request was enough to establish sufficient facts to believe a violation occurred. She further found that because the request was transferred among several employees and MDHR did not provide Harper with the name of the responsible authority, there was probable cause to believe that MDHR did not have adequate policies in place for dealing with data requests. Although O'Reilly found that MDHR actually did have a written data request policy, she also found probable cause that it had not been updated as required by law and that it was not easily accessible by the public. She finally found that although MDHR did have a responsible authority and designees for data requests, it did not make such individuals easily accessible to the public and that its policy referred only to the titles of the designees and not their names. The parties settled prior to the evidentiary hearing and the complaint was dismissed.

D.J., et al. v. Carver Cnty. Health and Human Services (2017)

Bradley and Karol Johnson are caretakers of their disabled adult sons.[49] The sons were enrolled in Consumer Directed Community Support (CDCS) services through their county. After disputes with CDCS, the sons were involuntarily terminated from the services. The Johnsons appealed the removal, and the sons were reinstated.

To help facilitate their appeal, the Johnsons sought copies of the county's entire case files for their sons. Carver County Health and Human Services (CCHHS), the administrator of CDCS, provided portions of the files relevant to the appeals free of charge, as required by law when the request is made for the purpose of such an appeal. If the Johnsons wanted all data in the files, the county insisted that the couple would need to make a MGDPA request and incur charges for copying.

The Johnsons argued that they were entitled to the entire case files free of charge under Minn. Stat. § 256.0451, subd. 2, which provides that appellants in human services proceedings have the right of access to the entire case file and "a free copy of all documents in the case file involved in a fair hearing appeal." However, the couple also argued that the case files were not public data, so data requests under MGDPA were inappropriate.

A human services judge reviewed the dispute and determined that the Johnsons were only entitled to the materials relevant to the appeal free of charge, which CCHHS had already provided. He upheld CCHHS' decision to offer the rest of the case files under the MGDPA. On their own behalf and without legal counsel, the Johnsons then filed a complaint with OAH seeking to compel CCHHS to provide the documents free of charge. Administrative Law Judge Jessica A. Palmer-Denig found probable cause to conduct a hearing.

At the conclusion of the hearing, all parties agreed that the sole matter at issue was the interpretation of Minn. Stat. § 256.0451. The statute says appellants in human services proceedings are entitled to "a free copy of all documents in the case file involved in a fair hearing appeal." The Johnsons argued that the plain language of the statute meant that they should receive a free copy of the case files. Palmer-Denig disagreed, finding that although the statute allowed them access to and the ability to inspect the entire files, it limited the free copies only to those materials that are relevant to the appeal. She reasoned that canons of construction meant that no phrase was to be interpreted as superfluous. Therefore, she wrote, the words "involved in a fair hearing appeal" must modify the phrase "free copy." Thus, Palmer-Denig found that the plain language of Minn. Stat. § 256.0451 meant that the Johnsons were entitled to access the entire file, but that only those portions of the file relevant to the appeal must be provided for free.

Hansen v. Indep. School Dist. 625 (2017)

Complainant Brian Hansen shared joint physical and legal custody of his son with his ex-wife.[50] As part of the custody order, Hansen was partially responsible for the cost of childcare. His ex-wife enrolled their son in Discovery Club, a program operated by St. Paul Public Schools (SPPS) that provides childcare before and after school. The payment account was under her name, and she was the sole payor.

Hansen requested from the school district the total amount of services rendered by Discovery Club for his son in the 2016 tax year. SPPS refused to provide the requested information, stating that the information was classified as private data and

48 In re Nicholas Harper v. Minnesota Dep't of Human Rights, No. 65-0305-33466 (Minn. Office Admin. Hearings).

49 In re D.J., S.J., Bradley Johnson, and Karol Johnson v. Carver Cnty. Health and Human Services, No. 71-0305-34354 (Minn. Office Admin. Hearings).

50 In re Birch Hansen v. Indep. School Dist. No. 625, No. 71-0305-34693 (Minn. Office Admin. Hearings).

MGDPA, *continued on page 30*

MGDPA, *continued from page 29*

did not belong to his son but to his ex-wife. Hansen clarified that he was not seeking payment details or invoices, only the total amount of care rendered. He also asked for a "written explanation regarding why his request was characterized as a request for private data on another individual under the MGDPA."

SPPS responded that the information was kept under the name of the payor and therefore was the data of the parent, not the child. The school district stated that it was not legally allowed to release the requested data. Hansen then sought an advisory opinion from Minnesota's Information Policy Analysis Division, now called the Data Practices Office, which provides guidance, training, and education on the MGDPA and state open meetings law. Hansen was informed that there was already an advisory opinion supporting his position, and after obtaining a copy of that opinion, he forwarded it to SPPS. However, the district continued to deny Hansen's request. SPPS' General Counsel asserted that his communication with the school district "has become harassing and burdensome" and could be criminal. Counsel for Hansen then filed a complaint with OAH.

Administrative Law Judge Jessica A. Palmer-Denig found probable cause that SPPS violated the MGDPA, stating that Hansen clearly requested information related only to his son and not any information about his ex-wife. She further held that Discovery Club's internal classification of its accounts did not change the fact that the data belonged to the child. Palmer-Denig quoted from the earlier IPAD opinion: "The Legislature has placed great import on the policy that parents are entitled, in most cases, to gain access to data about their children. Therefore, a government entity should not be precluded from providing data to one parent simply because doing so may mean the entity inadvertently or directly releases data about the other parent." The parties later filed a stipulation for dismissal and the complaint was dismissed.

Lastovich v. Scandia Valley Twp. (2017)

Complainant Steven Lastovich alleged that Scandia Valley Township, which is in Morrison County, Minn., imposed a large, unrecorded easement as a retaliatory action against him and another property owner.[51] Lastovich requested documents from the township regarding the right-of-way easements, including notices of violations and waivers. Lastovich initially directed his request to the town board, but did not receive any of the documents. He was then instructed to direct all further communications, including data requests, to the township's attorney. During a meeting with the township attorney, Lastovich became aware that the attorney was in possession of boxes of unrecorded documents, and that the town had even more. Lastovich directed a request to the town attorney requesting those documents and reiterating his earlier request. He mentioned that the documents did not appear to be available from the township's auditor. Lastovich was provided with only one document and was not given an opportunity to inspect the unrecorded documents at the town hall. He received no other response to his request. After filing a complaint on his own behalf with OAH, Lastovich, who is a licensed attorney, withdrew the complaint and the case was dismissed.

51 In re: Steven Lastovich v. Scandia Valley Twp., No. 19-0305-34908 (Minn. Off. Admin. Hearings).

Kane v. Minn. Dep't of Nat. Res. (2020)

April Kane was an employee of the Minnesota Department of Natural Resources (DNR).[52] During her employment, DNR installed security cameras inside and outside of the building and advised employees that recordings from the cameras were considered private data.

Kane submitted two data requests for video footage of herself for three specific dates. She specified which cameras she wished to view and asked DNR to preserve the footage. DNR had never received a request for footage of an employee before. In fact, it had not determined whether or how the footage was covered by MGDPA.

About two months after her initial request, Kane asked to view the DNR footage and asked whether a determination on its status had been made. DNR did not respond. Shortly thereafter, DNR became aware that no one had filled out the form to preserve the footage and it had been overwritten. Eventually, DNR determined that the footage was nonpublic security data, and so informed Kane. The department did not tell her that the requested footage no longer existed. On her own behalf and without legal counsel, Kane then filed a complaint with OAH.

Administrative Law Judge Jessica A. Palmer-Denig subsequently determined that DNR's classification of the security tape as nonpublic security data was correct, so Kane was entitled only to footage in which she was a subject. However, to be considered a data subject, Kane would need to be clearly identifiable in the footage. Previous opinions have held that people only in the background of footage are not considered "subjects" for purposes the MGDPA. If Kane had been in a prominent incident or if the cameras specifically captured her, she would have a right to the footage, Palmer-Denig found. In this case, because Kane was only occasionally caught on camera as she walked by, she was not a subject of the footage. As such, Palmer-Denig found that DNR did not violate the MGDPA.

However, Palmer-Denig also found that Kane's request amounted to a request for personal data. Under Minn. Stat. § 13.04, agencies must fulfill requests for personal data immediately or within 10 days of the request. Because DNR's response took months, it violated Minn. Stat. § 13.04. The confusion surrounding the request also showed that DNR did not have adequate policies to ensure prompt and appropriate response to data requests in violation of Minn. Stat. § 13.03, and Palmer-Denig fined DNR $100 for its violations.

Fraternity Complainant:

Minn. Alpha Chapter of Sigma Alpha Epsilon v. Univ. of Minn. (2015)

The Minnesota Alpha Chapter of Sigma Alpha Epsilon, a fraternity at the University of Minnesota (University), filed a MGDPA request with the University after a dean made statements that the fraternity had a bad reputation in the community, particularly with regard to alcohol and sexual assaults.[53] Counsel for the fraternity requested all documents regarding disciplinary actions against all university-affiliated fraternities for the past ten years. The fraternity requested that the University notify it of any other organization maintaining

52 In re April Kane v. Dep't of Nat. Res., No. 71-0305-36387 (Minn. Off. Admin. Hearings).

53 In re Minn. Alpha Chapter of Sigma Alpha Epsilon, on its own behalf and in its representative capacity for its members v. Univ. of Minn., No. 11-0305-32755 (Minn. Off. Admin. Hearings).

the records requested and that the University also attempt to send it anonymized summaries of any nonpublic or private data.

The University responded by providing the fraternity with emails and letters, but little else. The fraternity subsequently asked that any memoranda or notes from any University staff be provided. The fraternity noted that the material received did not support the dean's statement regarding its reputation, and asked that the University either supplement the responsive records or confirm that there were no other documents. If the response to the request was complete, the fraternity requested a statement from then-University President Eric Kaler on whether he agreed with the dean's statements about the fraternity's reputation and history with sexual assaults. The University did not reply. The fraternity filed an expedited MGDPA complaint with OAH, after which the parties settled and the case was dismissed.

Analysis

Analysis of the foregoing cases suggests that OAH can be a powerful mechanism for requesters to obtain third-party review of disclosure disputes. This is evidenced by the system's structure of the caseload. First, the process is much faster than typical litigation. Respondents have only up to 15 business days to respond, and the administrative law judge must make an initial determination within 20 business days of receiving the response. If there is probable cause to believe the MGDPA was violated, a hearing must be scheduled within 30 days, unless the parties waive it, and the judge is required to issue a decision within 10 business days of closing the hearing record. Second, OAH is relatively accessible to aggrieved requesters. Navigating the complaint process does not require hiring an attorney or having specialized legal knowledge, although as the foregoing review shows, many parties choose to be represented by counsel. Adjudicating through OAH is also likely to be less expensive than typical litigation. There is a $1,000 filing fee, which is not inconsequential, but it is still cheaper than hiring a lawyer in regular court. Most of the fee is refunded if a complainant prevails. Moreover, OAH has binding authority to compel government agencies to comply with the law, and orders can be enforced through district court.

This is not to say that OAH is effective only when it rules in favor of a requester. What matters is independent, third-party review, and dismissing a complaint on the merits provides resolution just as much ordering disclosure of a record. As the case review demonstrates, administrative law judges frequently explain their reasoning for their rulings, sometimes at length.

Analysis of the cases show that OAH has been used by a wide range of complainants, from individuals who were seeking records related to personal and property matters, to journalists requesting data for reporting, to businesses seeking records that would help their commercial interests, including Walmart, the largest corporation in the world when measured by revenue. That Walmart, which could no doubt afford to litigate in traditional court, chose to use the OAH procedure suggests that the timeliness of the review may have been an appealing feature influencing the company's decision.

In light of the clear advantages of OAH, it is confounding then that the process is used so infrequently. One potential explanation for the low usage is the $1,000 filing fee, which may be an obstacle for individuals to file complaints. States with more robust adjudication-oriented administrative review mechanisms, such as the Connecticut Freedom of Information Commission and the Pennsylvania Office of Open Records, do not have filing fees and review far more appeals than OAH. Thus, a smaller filing fee might lead to greater usage of the OAH process.

It would also be helpful to get a more complete sense of how often record requesters in Minnesota seek third-party review of their requests by comparing the findings of this article with caseload data from the Data Practices Office, which provides advice about the MGDPA. Any person who disagrees with how a government entity has responded to a MGDPA request can ask the Data Practices Office for a written opinion about the dispute. The Office "may give a written opinion regarding the person's rights as a subject of government data or right to have access to government data." Opinions issued by the Office are not binding on government entities, but pursuant to state statute, such opinions "must be given deference by a court or other tribunal in a proceeding involving the data." The Office posts its opinions online at https://mn.gov/admin/data-practices/opinions/library/.

Importantly, there is no fee to ask for an opinion from the Data Practices Office for disputes involving the MGDPA. The Office must also act relatively quickly. As previously noted, the Office has five business days to notify a requester if no opinion will be issued. If the Office decides to issue an opinion, it must do so within 20 days and can extend that timeline up to an additional 30 days. Thus in terms of cost and time, the Data Practices Office may be a more economical option for record requesters to obtain third-party review compared to OAH. On the other hand, the Data Practices Office has discretionary review and its opinions are nonbinding, whereas OAH must take the case and its decision are binding on government entities.

Conclusion

The expedited appeal mechanism added to the MGDPA in 2010 has provided a faster and less-expensive way to resolve disclosure disputes outside of traditional litigation. Complainants can seek intervention from OAH without a lawyer and can have their disputes reviewed by an administrative law judge within a matter of weeks. A key component of meaningful access to public records is timeliness, and OAH is one mechanism to get much faster resolution than filing a lawsuit. Moreover, OAH decisions are binding on government entities and officials. However, as this study shows, this mechanism has been used only 16 times in the past eight years. One reason may be the relatively steep $1,000 filing fee to submit a complaint. To help the public enforce their access rights, policymakers should consider lowering or eliminating the filing fee to make OAH intervention more accessible to people who wish to appeal denials of MGDPA requests and to receive a timely resolution.

— Jonathan Anderson
Silha *Bulletin* Editor

The First Amendment and Diversity: A Marketplace Failure?

36TH ANNUAL SILHA LECTURE

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BILLIONS OF PEOPLE USE SOCIAL MEDIA PLATFORMS and have access to a 5,000-plus-channel streaming and broadcasting universe, yet citizens are less informed than ever before. They select their preferred sources, often based on ideology and politics, but rarely seek out media options that challenge their preconceptions. Coupled with the lack of diversity in media ownership and management, it appears that the concept of a robust "marketplace of ideas" in today's America has failed.

Can we change this? Diversity in the media by itself isn't enough to elevate and reinvigorate the national conversation. But without welcoming disparate and even antagonistic voices, how can we hope to mitigate polarization and advance the core purposes of the First Amendment?

S. Jenell Trigg's remarkable career in media and law, as well as her volunteer experience working with numerous nonprofit groups, has given her unique insight into current issues of diversity and free speech. Following a 16-year career as a broadcast television sales/marketing executive, Ms. Trigg earned her law degree *magna cum laude* from The Catholic University of America, Columbus School of Law. She then worked at the Federal Communications Commission and as Assistant Chief Counsel for Telecommunications in the Office of Advocacy, U. S. Small Business Administration, before becoming the first African-American partner at Lerman Senter PLLC in Washington, D.C. She has been nationally recognized for her longstanding dedication and commitment to promoting minority, women, and small business ownership and employment in the media and communications industries, receiving lifetime achievement awards from the Rainbow PUSH Coalition and the Multicultural Media, Telecom, and Internet Council.

- **TUESDAY, OCT. 26, 2021**
- **7:00 PM, CDT**
- **COFFMAN MEMORIAL UNION THEATER UNIVERSITY OF MINNESOTA TWIN CITIES CAMPUS–EAST BANK**
- **FREE AND OPEN TO THE PUBLIC**
- **PARKING IS AVAILABLE IN THE EAST RIVER ROAD GARAGE**

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